



## Weekly Legislative Update

### **Complying with Wage and Hour Regulations Common Misconceptions and Compliance Issues**

#### Salary Basis

To qualify for exemption from overtime, Administrative, Executive and Professional employees have to be paid at least \$684 per week on a guaranteed basis. Note that the Outside Sales Exemption requires no guaranteed salary, more less minimum wage. The Computer Exemption requires at least \$684 per week on a salaried basis or paid on an hourly basis at a rate not less than \$27.63 per hour.

Misconception 1: If an employee is paid on a guaranteed salary basis of at least \$684, regardless of duties, they are exempt from overtime. This is incorrect as to be exempt from overtime under the white-collar exemptions as noted, the employee must meet the duties test as set forth under each exemption by the FLSA and meet the salaried basis requirements.

Misconception 2: Nonexempt employees cannot be paid on a salaried basis. Nonexempt employees are simply required to receive overtime for hours worked in excess of 40 hours per week (federal basis) based on their regular rate of pay. They also must meet at least federal or state minimum wage requirements. As such, a nonexempt employee can be paid on a salaried basis, salary plus commission, commission only, hourly plus commission or other types of pay plans. As long as the employee receives on average for each hour worked minimum wage and receives time and one-half of their regular rate for hours in excess of 40 hours per week, the pay plan is compliant.

In computing the regular rate for overtime purposes, the regular rate is determined by totaling all monies earned for the given workweek (hourly/salary wages, commissions and bonuses, spiffs and other incentives). These total earnings are then divided by total hours worked. The additional half-time is calculated by multiplying the overtime hours times half-time of this regular rate.

Misconception 3: Under the salaried basis rule, we cannot deduct from the salary for any reason. An exempt employee's salary can be reduced for specific reasons.

These include:

- Deducting pay for violations of safety rules
- Suspending an exempt employee for disciplinary reasons
- Reducing pay, even on a partial day's absence for intermittent family and medical leave
- When an exempt employee is out sick for the whole day and does not have any accrued or earned sick/leave/PTO time

Please note that the only time we can deduct from the salary in partial day's work is for intermittent family and medical leave.

However, we can require the exempt salaried employee to utilize any earned, unused sick time/leave/PTO. Once exhausted, an exempt employee missing time in partial day increments must be paid for the full day.

If out of accrued/earned time, an employer can deduct in full-day increments for those reasons as noted above.

Misconception 4: We can make deductions from an exempt employee's salary while they are out for jury duty. An employer cannot make deductions from the pay of an exempt employee for absences caused by jury duty, attendance as a witness or a temporary military leave. However, an employer can offset fees received such as jury fees, witness fees or military pay for a particular week against the salary for that week.

Misconception 5: If an exempt employee is separated from the company, we must pay him/her for the full week of salary regardless of the number of days worked. An employer is not required to pay the full salary in the first or last week of employment if the employee does not work the full week. You are only required to pay the salary for the actual days worked.

Misconception 6: If we have exempt employees working more than 40 hours or performing extra duties and we pay them overtime or additional monies based on hours of work, they lose their exemption status. The only requirement for an exempt position's compensation is the guaranteed salary basis of \$684 per week (less Outside Sales Exemption). An employer can provide additional monies based on hours worked, commissions based upon results, etc. without losing the exemption status.

### Calculating Overtime

Misconception 1: If an employee is taking more breaks than we allot by policy, we can deduct those additional breaks from their pay. An employer cannot make deductions from an employee's pay who take short breaks or who take more breaks than what policy allows if the breaks are less than 20 minutes. If an employee takes any break during the day regardless of policy that is less than 20 minutes, the employer is required to compensate the employee. Please note that the Fair Labor Standards Act does not require employers to provide break or meal periods.

Misconception 2: We must pay an employee based on their clocked hours even though they may clock in early or clock out late. An employer is not required to pay an employee should they arrive early, clock in and not perform any work until it is time. SESCO recommends to utilize the 7/8 rounding method as well as implement policy stating that employees who clock in early or late and do not perform any work will not be compensated. As labor costs are your largest controllable costs, it is critical that department heads/managers/HR professionals review all time records before processing payroll. Time records can be changed/alterd to reflect actual time worked and SESCO recommends that both the manager/HR Director and employee sign off stating that true and accurate hours have been recorded.

Misconception 3: If a timecard states that the employee has been paid for 48 hours, we must ensure that overtime is paid based on their regular rate for these eight (8) hours of overtime. An employer must only pay overtime for actual hours worked in excess of 40 hours per week. For example, if an employee works 40 hours in a given workweek and is paid an additional eight (8) hours for a vacation day, no overtime is required to be paid on the eight (8) hours of non-working time, re: vacation day.

Misconception 4: We have to pay overtime for break times if an employee is at work over 40 hours in a workweek. Break times will not be considered hours worked if they satisfy the following:

- The break is more than 20 minutes if it is a rest break or more than 30 minutes if it is a meal break.
- The employee is completely relieved from duty; for example, a meal break is not spent answering phones, working at their desk, working at the computer, watching over a machine.
- The employee is free to leave his or her work station.

Misconception 5: We do not have to pay an employee who works overtime, because it was not pre-approved. No, you must pay for all hours worked even if not pre-approved. The Wage-Hour Investigator will deem that the business benefited from the employee's work and that you knew or should have known that they were performing work. However, SESCO suggests a very strong, direct policy in the employee handbook discussing overtime and not working overtime unless approved. Further, disciplinary action is the most efficient way to address these types of issues.

Misconception 6: We have an exempt employee who works less than 40 hours per week; however, because they are exempt, we must guarantee the salary basis of \$684 per week. The only requirement for compensation, even if the exempt employee works less than 40 hours, is to pay at least minimum wage. You do not have to pay the position the \$684 per week. However, if the position works more than 40 hours per week, to avoid non-compliance, you must guarantee them the \$684 per week to avoid overtime payments.

Misconception 7: Some of our employees work 24-hour shifts. They may not work all 24 hours as we do give them time to sleep and eat. However, because we require them to be at our place of business, we must pay them for 24 hours. Sleep time and meal periods will not be considered hours worked if they satisfy the following:

- The employee is on duty 24 hours or more
- The employee and the employer agree to exclude from work hours bona fide meal periods and a bona fide, regularly scheduled sleeping period of not more than eight (8) hours.
- The employer provides adequate sleeping facilities and employees usually can enjoy uninterrupted sleep period.

- Should a sleep period be interrupted and the employee is awakened and asked to perform work, that time is counted as work. If the employee gets five (5) hours of sleep, the entire sleep period of eight (8) hours can go unpaid.

Misconception 8: We have multiple locations and at times require our employees to travel to other sites during their work day. We require them to clock out when they leave and clock back in when they arrive at the new location. As such, we do not have to pay for this drive/non-working time. Travel to and from work or travel outside the normal work day is generally not considered compensable time.

However, travel time must be counted as hours worked to include:

- It is time spent traveling from one work site to another
- It is driving even after hours to fulfill an employer's requirements or requests such as going by the bank on the way home
- If the employee has gone home from work for the day but is called out again to travel, this would be compensatory.

Misconception 9: Sometimes we offer training to our employees. Since we are paying for the training and they are not doing any work, we do not have to pay our employees. Anytime an employer requires an employee to attend training during working hours, that time will be considered working time. Training is not considered hours worked if all of the following conditions are satisfied:

- Meetings are held outside of hours worked
- Employee attendance is completely voluntary
- If an employee does not show they are not disciplined in any way
- The training is not directly related to the employee's job
- The employee does no work during the training time
- The course or training is held after work hours and is not a requirement of the job even if the subject matter pertains to the job.

Misconception 10: We have to use a time clock or electronic timekeeping system to keep track of the hours of our nonexempt employees.

The DOL states that employers may use any timekeeping method that they choose. This would include allowing employees to record their hours of work by hand. Regardless of the method, SESCO always recommends that the employee and manager/HR Director sign off agreeing that true and accurate hours of work have been recorded.

Misconception 11: Our company supports our community in a number of different ways to include supporting charities. We recommend to our employees that they should volunteer. As it is not working time, we do not have to pay them.

Charitable work performed at the employer's request as part of the job or during working hours is considered work time. Charitable work/volunteering will not be considered hours worked if:

- It is completely voluntary (even if the program is sponsored by the employer)
- It is performed outside of scheduled working hours

If employees get the impression that their jobs would be in jeopardy in any way or that they would receive fewer perks for failing to contribute to charity work, a court could say that the hours were not voluntary but were coerced. In addition, employees cannot perform volunteer work for an organization that employs them if the work is similar to that for which they are paid.

Misconception 12: We pay our employees bonuses and incentives for things such as meeting production goals, good attendance, good safety goals, etc. We are not required to pay overtime on these additional earnings.

There are technically two (2) different types of bonuses which include discretionary and non-discretionary. Discretionary bonus payments are completely that, discretionary. These bonuses are not communicated to employees, employees are not working towards accomplishing goals to receive the bonus and these bonuses are not regular and recurring. Typically defined discretionary bonuses which would not be required in overtime calculations are such as Christmas bonuses. Non-discretionary bonuses are required to be included in overtime payments. Non-discretionary bonuses are bonuses that incentivize an employee's behavior or production. These monies must be included in the regular rate for the purposes of overtime. Even if these non-discretionary bonuses are paid on a monthly, quarterly or even an annual basis. An employer is required to go back and roll these non-discretionary bonuses into each workweek and calculate overtime on these bonuses.