



FAIR LABOR

STANDARDS ACT

(FLSA)

ADMINISTRATIVE

GUIDE

FOR MANAGERS

AND

SUPERVISORS



Highlights of New Overtime Regulations

The Fair Labor Standards Act of 1938 (FLSA) is one of the most important labor regulations affecting compensation in the workplace. These regulations have remained basically unchanged since their inception over sixty (60) years ago, challenging Human Resources professionals to conform to outdated regulations while trying to adapt them to the modern workplace. The federal government originally introduced overtime regulations as a stimulant for business to hire new workers rather than pay overtime to current employees.

FAIR LABOR STANDARDS ACT (FLSA)

- *Governs overtime eligibility*
- *Federal minimum wage provision: \$5.85/hr. for hourly (non-exempt) employees.*
- *Overtime provision: 1 ½ times the regular rate of pay for all hours worked over 40 hours in a workweek for hourly (non-exempt) employees. Hourly employees are guaranteed overtime regardless of how much they are paid. Public employers, with the agreement of their employees, can give compensatory, or “comp,” time off at a rate not less than time and a half in lieu of cash overtime.*
- *Recordkeeping: Employers must maintain and preserve certain basic payroll information for each employee up to three (3) years.*

QUICK LOOK

- *The new regulations focus on the exemption tests. The Department of Labor (DOL) has attempted to both simplify and clarify the current regulations and exemption tests.*
- *Exemption from overtime provisions of the Fair Labor Standards Act (FLSA) will continue to rely on three (3) basic tenets:*
 - (1) **salary basis** - the “mark of the status of an exempt employee” where the employee must be paid a predetermined and fixed salary not subject to reductions due to quality or quantity of work performed.
 - (2) **salary level test** - workers paid less than \$23,660 or \$455 per week are now automatically guaranteed overtime regardless of their job titles or duties.
 - (3) **duties test** - the employee’s duties must meet the new definition of exemption as an Executive, Administrative, Learned Professional, Creative Professional, Computer or Outside Sales employee.

New Regulations

- The new regulations focus on the exemption tests and have a single test for each exemption which vary significantly.
- Under the new tests, any employee earning less than \$23,660/year or \$455/week are guaranteed overtime protection and should be treated as a nonexempt employee.
- Employees who earn more than \$100,000/year need not meet all of the elements of the standard duties for exemption tests, if they have an identifiable executive, administrative or professional function.

New Definition of Primary Duty

- The New Definition of “Primary Duty” means the principal, main, major or most important duty the employee performs.
- Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the job as a whole.
- The amount of time spent can be a useful guide; but time alone is not the sole test.
 - A. Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement.
 - B. However, the regulations do not require that exempt employees spend more than 50% of time performing exempt work.

Exemption Tests

There are six (6) white-collar exemption tests to evaluate whether an employee qualifies for exemption from the Fair Labor Standards Act Overtime Provisions.

Executive

- Primary duty of the management of the enterprise or a recognized department or subdivision
- Customarily and regularly directs the work of two or more full-time employees (or equivalent)
- Has the authority to hire or fire other employees (or the recommendation must be given particular weight)
- Salary Test: at least \$455/week (\$23,660)

Administrative

- Primary duty of performing office or nonmanual work directly related to the management or general business operations of the employer or the employer’s customers
- Exercises discretion and independent judgment with respect to matters of significance
- Salary Test: at least \$455/week (\$23,660)

Learned Professional

- Primary duty of performing work requiring advanced knowledge, defined work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment.
- Advanced knowledge must be in a field of science or learning and customarily acquired by a prolonged course of specialized intellectual instruction
- Salary Test: at least \$455/week (\$23,660)

Creative Professional

- Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic endeavor
- Salary Test: at least \$455/week (\$23,660)

Computer

- Remains basically the same; employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field
- Salary Test : at least \$455/week (\$23,660) or \$27.63/hour

Outside Sales

- Primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
- Customarily and regularly engaged away from the employer's place or places of business
- Salary Test: No minimum required

Generally, full salary must be paid for any week in which the employee performs any work, except the first and last weeks worked for the organization. Less than full salary may be paid under the following circumstances:

- In case of absence for full days for personal reasons.
- In case of absence for full days for sickness or disability if there is a bona fide policy for sick or disability leave, even if the employee has not qualified for the benefits yet.
- To offset amounts received for jury fees, witness fees, or military pay.
- As penalty for violating safety rules of "major significance."
- As unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules.
- As unpaid leave (even less than full day) pursuant to FMLA. A full day is defined as 7.5 or 8.0 hours for exempt employees.

Improper deductions can result in loss of exemption where there is an actual practice of making improper deductions. Employers can create a safe harbor by issuing a clearly communicated policy prohibiting improper deductions including a complaint mechanism, reimbursement for improper deductions, and a good faith commitment to comply in the future.

Deductions for Disciplinary Reasons/ Personal Absences

A. Disciplinary Reasons

Under the old regulations, an employer could not suspend an employee without pay for disciplinary reasons (other than for violating major safety rules) in any increment other than a full week without violating the salary basis test. This has meant that in many cases, exempt employees have been subjected to different progressive disciplines than non-exempt employees.

Under the new rule:

- Employers may make deductions from salary for unpaid disciplinary suspensions of one or more full days imposed.
- The deduction must be made in good faith for infractions of workplace conduct rules.
- The suspensions **must** be imposed pursuant to a written policy applicable to all employees.

This change permits employers to apply the same progressive disciplinary rules to exempt and non-exempt employees. It is a necessary change in light of federal and state anti-discrimination laws requiring employers to take effective remedial action to address employee misconduct, particularly that of exempt supervisors.

Workplace Conduct:

- Refers to “serious workplace misconduct like sexual harassment, violence, drug or alcohol violations, or violations of state or federal law.”
- Workplace conduct **does not** include **performance** or **attendance issues**.
- Courts could interpret deductions in increments of less than a week for insubordination, for example, to violate the salary basis test.

To satisfy the rules under the salary basis test:

- The disciplinary suspension must be imposed pursuant to a UMDNJ “written policy.” The specific violation should be indicated when specifying the written policy.
- The written policy need not include an exhaustive list of specific violations that could result in suspension, or a definitive declaration of when a suspension will be imposed. *NOTE: The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension (e.g. a sexual harassment policy, distributed generally to employees that warns employees that violations of the policy will result in disciplinary action up to and including suspension or termination).*

B. Personal Absences

Deductions for personal absences within the exempt employee's control have been treated differently under the salary basis test, and that principle has not changed under the new regulations. Pursuant to the new regulation:

- Such absences may occasion deductions from salary proportional to the time actually missed by the employee in full-day increments.
- Deductions may not be made based upon the hours worked on a given day.
- Deductions from an exempt employee's pay for full-day absences occasioned by sickness or disability, 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, is permitted.
- Deductions may be made for such absences before the employee has qualified under the plan, policy, or practice, and after the employee has exhausted his or her leave allowance.

Partial Day Deductions

There are only three limited circumstances under which employers can make partial-day deductions from an exempt employee's salary:

- In the initial or terminal weeks of employment, the payment of an hourly or daily equivalent of the employee's salary for the time actually worked is permissible.
- For violations of "safety rules of major significance" (which is defined narrowly and for which employers usually would discharge an employee or suspend him or her for one or more full days.
- For intermittent leave taken under the Family & Medical Leave Act (FMLA).

Note: Partial day deductions may be taken and charged to employee benefit time only and may not be deducted from an employee's salary.

Intermittent Leave

1. Deductions for intermittent leave are permissible only when the leave is taken under the FMLA. If an employee has not yet qualified for FMLA leave under the law, but the employer's policies generously provide for leave for the employee, deductions for intermittent leave taken under the employer's policy do not qualify under this exception.
2. If the employee has taken his or her 12 weeks of FMLA leave, but the employer's policies generously provide for additional leave, or the additional leave is granted as an accommodation under the Americans with Disabilities Act, partial-day deductions cannot be made.

Visit the Department of Labor's Fair Pay Website at:
www.dol.gov/esa/regs/compliance/whd/fairpay

Participate in the On-Line Seminar where DOL experts describe the new FairPay overtime rules. The video is enhanced with a synchronized transcript and slide presentation and is searchable by exemption.