

## **Overtime Pay**

**Paying an employee a salary or commission does not exempt an employer from paying overtime.** One of the most common mistakes employers make is assuming that every employee who is paid on a salary or commission basis can work unlimited hours without being paid overtime. Many employees who are paid on a salary or commission basis must also receive overtime pay when they work more than 40 hours in a 7-day workweek. In order to be exempt from overtime pay requirements, an employee who is paid on a salary or commission basis must meet specific requirements.

**Paying a salaried employee at least \$455 per week does not always exempt a retailer from paying overtime.** The \$455 per week figure is only one of several criteria that must be met in order for a salaried employee to be exempt from overtime pay requirements.

**Giving employees titles such as Manager, Office Manager, Stockroom Manager, etc. does not exempt an employer from paying overtime.** An employee's job title has no bearing on whether that employee is exempt from overtime pay requirements. While it seems as if a "Manager" should automatically fall under the Administrative Exemption category, the actual job duties - not the title - must be considered.

### **Executive exemption**

#### **Exempt from minimum wage & overtime provisions**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

### **Administrative exemption**

#### **Exempt from minimum wage & overtime provisions**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

### **Employees paid commissions by retail establishments who are exempt**

#### **Exemption from overtime pay only**

Certain commission employees of retail or service establishments may be exempt from overtime pay requirements. Retail and service establishments are defined as establishments 75% of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

#### **Requirements for this exemption**

If a retail or service employer elects to use the Section 7(i) overtime exemption for commissioned employees, three conditions must be met:

1. the employee must be employed by a retail or service establishment, and

2. the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
3. more than half the employee's total earnings in a representative period must consist of commissions.

Unless all three conditions are met, the Section 7(i) exemption is not applicable, and overtime premium pay must be paid for all hours worked over 40 in a workweek at time and one-half the regular rate of pay.

The representative period for determining if enough commissions have been paid may be as short as one month, but must not be greater than one year. The employer must select a representative period in order to determine if this condition has been met.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met.

To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer may divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period. If the result is greater than time and one-half the minimum wage, this condition of the exemption has been met.

Hotels, motels and restaurants may levy mandatory service charges on customers which represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions in section 7(i) are met, the service employees may be exempt from the payment of overtime premium pay.

### **Professional employee exemption**

#### **Exempt from minimum wage & overtime provisions**

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

**Paying employees on a salary basis or paying on commission thinking no overtime pay is required.**

If an employee is paid on a salary basis, it does not mean they are automatically exempt from minimum wage and overtime pay requirements. It's what the employee actually does for a living that determines whether or not they must be paid overtime.

There are many categories of exempt employees, but they all have something in common: the employee must meet certain requirements. Just because an employee has the title of "Manager" or some other title that sounds administrative, it doesn't mean they're exempt from minimum wage or overtime requirements.

Similarly, an employee who is paid on commission may still be entitled to overtime pay. It depends on whether they meet certain requirements in the law.

**Paying all hours of work at straight time and having the employees sign something releasing the business from the obligation to pay overtime is not legal.** An employee is either entitled to overtime pay under federal law, or they are exempt. If an employee is entitled to overtime pay and they sign a waiver saying they agree to work for straight time pay regardless of the number of hours they work, that agreement isn't worth the paper it's written on. The employer is still obligated to pay time and a half for all hours worked over 40 within a 7-day workweek.

**Hiring minors under 16 years of age in the belief that young workers don't cost as much, don't know much, and rarely complain.** It doesn't matter how old an employee is, the minimum wage is still \$5.15 per hour. If you own a retail business, you better not be hiring anyone under the age of 14 unless it is your own child. Federal law restricts the hours that 14 and 15 year old employees can work - and restricts the types of work they can do. And yes, teenagers (and their parents) DO complain when they figure out a business is violating the law. That's why so many businesses get whacked with penalties for child labor law violations.

**Do not assume a competitor is paying its employees correctly, and model your business upon theirs.** Don't assume the guy down the street knows more than you - do your own checking.

**Even if a business grosses less than \$500,000 a year, its employees are not automatically exempt from overtime pay.** Some or all of its employees may be entitled to overtime pay, depending on what their job entails. If an employee handles credit cards or checks, picks up mail at the Post Office, or receives goods shipped in from out of state, then that employee is engaged in "interstate commerce" and is entitled to minimum wage for all hours worked, and overtime pay (time-and-a-half) for all hours over 40 in a 7-day workweek - unless the employee falls into a specific exempt category.

**Guidelines for payment for travel time, training time, or other work activities.**

Attendance at lectures, meetings, training programs and similar activities can be unpaid time only if four criteria are met:

1. It is outside normal hours,
2. It is voluntary, not job related, and
3. No other work is concurrently performed.
4. Whether or not travel time is compensated depends on the kind of travel involved. If, for example a worker drives from home to the store where they work, that travel isn't work time. If an employee travels from the store to another work location for a special one day assignment, that may be considered work time. Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

**Record keeping is important.** If you employ someone - no matter if it's temporary, permanent, full time or part time - you must keep records of hours worked, the basis on which they were paid, their regularly hourly rate, total earnings, date of payment, and how much they were paid, among other things.

**Seasonal businesses are exempt from overtime only in certain circumstances.** The exemption for seasonal businesses applies to seasonal amusement or seasonal recreational establishments. It does not apply to seasonal restaurants or lodging establishments.

**Holding the last paycheck for a month or two is not legal.**

Whether an employee quits or is fired, and regardless of how much notice they give, the final paycheck is due on the regular payday for that pay period.

**Federal youth employment laws prohibit employees under the age of 18 from performing hazardous jobs.**

It is illegal to allow children to run power tools. It doesn't matter if their parents work for you or if their parents say it's okay; it's not legal.

**If an employee is out on worker's compensation, can they still earn vacation time?**

Vacation time is a benefit that is earned by employees that are working. You are not required to allow an employee to earn vacation time if they are not working. If you have a written contractual agreement with the employee stating otherwise, then the agreement would take precedence.