

ANSWERING YOUR **OVERTIME** QUESTIONS

FOR CHURCHES AND MINISTRIES

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Enhancing Trust

INTRODUCTION

The United States Department of Labor's ("DOL") final overtime rule, updating the salary threshold required for the executive, administrative, and professional ("white collar") exemption available under the federal Fair Labor Standards Act ("FLSA") was scheduled to be effective December 1, 2016. This final rule would have raised the salary threshold from \$455 per week (\$23,660 for a full-year worker) to \$913 per week (\$47,476 for a full-year worker), effective December 1, 2016. Such a substantial increase could have potentially imposed significant financial burdens on churches and ministries.

A federal judge for the U.S. District Court for the Eastern District of Texas blocked the Department of Labor's (DOL's) new overtime rule. Judge Amos Mazzant ruled, on November 22, that the DOL exceeded its legal authority in implementing the new rule.

For now, the new overtime rules will not take effect as planned on December 1, so employers may continue to follow the existing overtime rules. The injunction applies until Judge Mazzant issues a full ruling on the validity of the new pay regulations. If he rules that the new overtime rule is invalid, the decision could be appealed to a higher court, although this appears to be unlikely.

It is important for churches and ministries to remain attentive to the existing overtime rules. This is an excellent opportunity to examine and update pay practices, to ensure legal compliance and address employment compensation matters.

ECFA is offering a webinar, **5 Best Practices and Pitfalls with the Overtime Rules**, presented by Attorney Sally Wagenmaker on January 12, 2017 at 1 p.m. EST. This webinar is free to ECFA members and available for a modest fee to nonmembers. It will provide an update on the legal status of the overtime rule and a review of existing rules. www.ECFA.org

ECFA expresses appreciation to Sally Wagenmaker for her outstanding assistance in providing these questions and answers on the new overtime regulations. Wagenmaker and Oberly (<http://www.wagenmakerlaw.com>) provides legal counsel to nonprofit organizations across the nation with offices in Chicago and Charleston.

These answers are not intended to substitute for legal counsel specific to an organization's own circumstances and geographic location, particularly since applicable federal, state, and local laws vary widely. Consequently, it is highly recommended that knowledgeable nonprofit legal counsel be sought for such specific questions and particular issues.

FLSA COVERAGE

QUESTION 1

What is the difference between an “exempt” employee and a “non-exempt” employee, particularly with regard to the “white-collar” exemption?

1 Q. What is the difference between an “exempt” employee and a “non-exempt” employee, particularly with regard to the “white-collar” exemption?

- A.** An “exempt” employee is not subject to the FLSA’s employee protection requirements and thus will not be entitled to overtime pay. To be exempt under the white-collar exemption, the employee must satisfy all three elements of the FLSA test: (a) their job activities must fit within the FLSA’s description of “executive, administrative, or professional” (such as the exercise of independent judgment over significant work matters, supervisory responsibilities, or the performance of work required advanced knowledge); (b) they are paid on a salary basis; and (c) they meet the FLSA’s salary threshold. More information about the requisite job duties may be found in the [DOL’s Fact Sheet #17A \(“Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees”\)](#), which is available on the DOL website.

If an employee does not meet the white-collar salary threshold, he or she will be “non-exempt.” Consequently, the employer will owe the employee overtime pay for hours worked over 40 in a work week, at 1½ times the employee’s regular rate of pay—even if the employee continues to earn a salary.

FLSA COVERAGE

QUESTION 2

May employers be excluded from overtime requirements if they do not satisfy the FLSA's "enterprise coverage" and "individual coverage" stipulations?

2 Q. May employers be excluded from overtime requirements if they do not satisfy the FLSA’s “enterprise coverage” and “individual coverage” stipulations?

A. Perhaps, but both the FLSA and applicable state laws need to be evaluated.

The FLSA is a federal law applicable to employers only if either (a) they are engaged in sufficient business activity, in which case the entire organization will be covered (“enterprise coverage”), or (b) their employees are engaged in sufficient interstate commerce, in which case these employees will be covered (“individual coverage”). More information is generally available through the [DOL’s Fact Sheets #14](#) and [#14A](#), which can be found online.

For FLSA enterprise coverage, an organization must receive at least \$500,000 per year in revenues from “ordinary commercial business” activity, such as services or goods provided in exchange for fees and investment income, and have at least two employees engaged in interstate commerce. Donations and membership fees are excluded from this calculation. Consequently, some nonprofits may be excluded on the basis of “enterprise coverage.” Note that hospitals, schools, and residential care facilities may not avail themselves of this exclusion.

The threshold for FLSA individual coverage is extremely low. It may be satisfied by making interstate phone calls, engaging in email communications, processing out-of-state donations, or ordering supplies via the Internet. Consequently, many employees likely will be covered under the FLSA on this basis.

Even if the FLSA does not apply under either enterprise or individual coverage, state law overtime counterparts may nonetheless apply. State law overtime requirements do not include these coverage requirements, since no interstate elements are involved. For example, Illinois law requires that overtime pay be paid to employees, borrowing the FLSA’s three-part test for the white-collar exemption—including the newly increased salary threshold. Consequently, an employer in Illinois may owe overtime pay under state law instead of the FLSA, regardless of any federal coverage consideration. *It is therefore extremely important that employers determine whether additional state law requirements may apply to them, even if the FLSA does not.*

FLSA COVERAGE

QUESTION 3

What may be counted
toward the salary threshold
for the white-collar exemption?

3 Q. What may be counted toward the salary threshold for the white-collar exemption?

- A.** Cash wages, non-discretionary (i.e., earned) bonuses of up to 10% of the threshold, and commissions (also to a limited extent) may be counted as compensation for purposes of the salary threshold. Unfortunately, however, employee fringe benefits such as payment of health insurance premiums, retirement contributions, and provision for lodging and meals cannot be counted. Consequently, employers with employees below the salary threshold may wish to rethink employee benefits and perhaps offer at least some of them through increased wages (albeit with resulting employment tax consequences).

CATEGORICAL EXEMPTIONS

QUESTION 4

Are ministers exempt
from FLSA coverage?

4 Q. Are ministers exempt from FLSA coverage?

- A.** Yes, provided that the workers may legally be defined as “ministers.” The ministerial exemption is a legal principle grounded in federal court decisions recognizing that ministers cannot bring discrimination claims against their employers, primarily due to First Amendment considerations and the related goal of avoiding government involvement in religious issues.

Most notable for our purposes here, some courts have expanded the ministerial exemption’s applicability to wage claims, under both the FLSA and state law counterparts. The DOL has also recognized a general clergy exemption from FLSA coverage. (See Question #5 regarding DOL guidance, a sample state exclusion, and appellate court rulings.) Due to constitutional concerns, specific parameters for the ministerial exemption are inherently challenging for federal courts, state courts, and government agencies.

Subject to these overall considerations, an employer may apply several guidelines in evaluating whether any of its employees are excluded from FLSA (and corresponding state law) coverage based on the ministerial exemption. According to the U.S. Supreme Court’s landmark’s 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the following four factors are key:

- (1) the employee’s formal job title, as reflecting ministerial aspects and any associated religious training or credentialing;
- (2) the substance reflected in such title, consistent with the organization’s religious functions;
- (3) the employee’s own use of such title (how the person holds himself or herself to others); and
- (4) the important religious functions the employee performs for the church, such as communicating religious teachings to others.

As one appellate court previously determined, “[a]s a general rule, if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered ‘clergy.’” (See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

In summary, no one factor is determinative for ministerial status, but the person's job duties, title, and related training should all have a heavy religious emphasis for the ministerial exemption to apply. Notably too, the employer does not need to be a church; it may be a school, a campus ministry, or other faith-based organization.

CATEGORICAL EXEMPTIONS

QUESTION 5

Does the ministerial exemption
mean that all churches
and their employees
are exempt from the FLSA?

5 Q. Does the ministerial exemption mean that all churches and their employees are exempt from the FLSA?

A. No. Per the guidance in Question #4, a person whose job title is “Pastor” or “Minister” and carries out religious activities—such as leading worship, preaching, or providing spiritual direction—may well qualify for the ministerial exception. They would therefore be legally precluded from asserting any discrimination or wage claims against their employers. But other employees engaged in related ministry work such as clerical support, child care, and facility maintenance likely will not qualify for this exemption.

CATEGORICAL EXEMPTIONS

QUESTION 6

Does the ministerial exemption include any minimum salary threshold requirement, such as for the white-collar exemption?

6 Q. Does the ministerial exemption include any minimum salary threshold requirement, such as for the white-collar exemption?

- A.** No, per both federal court decisions and published DOL guidance, no salary threshold requirement exists for the ministerial exception.

The DOL stated multiple times in its economic report accompanying its 2004 overtime regulations that clergy are categorically excluded from FLSA coverage, for both overtime and minimum wage requirements. (See 29 CFR Part 541—Economic Report (2004)), available at ww.dol.gov/whd/overtime/econreport.pdf.) The DOL recently affirmed such exclusion in its Q & A document from its own “General Information Overtime Webinars” (available online at www.dol.gov/whd/overtime/final2016/webinarfaq.htm), as follows:

Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be “employees.” Since these persons are not considered employees under the Fair Labor Standards Act (FLSA), they are not entitled to the protections of the FLSA.

Such categorical exclusion may be found in state legislation as well. For example, Illinois law closely tracks this definitional exclusion from state minimum wage and overtime requirements, likewise without any salary threshold requirement. (See 820 ILCS 105/3(d)).

This legal approach is consistent with appellate court decisions interpreting the ministerial exemption for purposes of wage claims, in specific jurisdictional regions as follows. First, in *Schleicher v. Salvation Army*, 518 F.3d 472 (2008), the Seventh Circuit Court of Appeals (covering Illinois, Indiana, and Wisconsin) analogized the plaintiffs’ position to that of monks who take a vow of poverty. The court then rejected the plaintiff employees’ wage claims as barred by the ministerial exemption, concluding that “the best way to decide a case such as this [consistent with the evidence], is to adopt a presumption that clerical personnel are not covered by the Fair Labor Standards Act.”

Second, in *Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (2010), the Ninth Circuit Court of Appeals (covering California, Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) similarly ruled that a seminarian who was paid \$225 for working eight hours a day, seven days a week, was barred by the ministerial exemption from asserting any overtime claim under Washington law. Third, in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 307 (4th Cir. 2004) the Fourth Circuit Court of Appeals (covering Virginia, Maryland, North Carolina, and South Carolina), barred an employee's wage claim under the ministerial exception, based on the employer's status as a religious institution and the primarily religious nature of the employee's job as a kosher food supervisor.

CATEGORICAL EXEMPTIONS

QUESTION 7

Can missionaries be entitled
to overtime pay as
non-exempt employees?

7 Q. Can missionaries be entitled to overtime pay as non-exempt employees?

A. Several legal considerations come into play regarding missionaries' compensation.

First, an initial question must be answered as to whether the missionaries are employees for overtime law purposes. The FLSA's definition of "employee" is fairly broad, so many missionaries may well be employees of their mission organizations. But independently working missionaries, such as those commissioned by one or more churches, may not be.

Second, as a general rule, missionary employees are not subject to the FLSA (or comparable state laws) while they are physically working in foreign countries. The minimum wage, maximum hour, and overtime provisions of the FLSA do not apply to an employee "whose services during the workweek are performed in a workplace within a foreign countries or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act []; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island." 29 U.S.C. § 213(f).

Third, missionaries working in the US during a work week may be subject to FLSA and state overtime laws. However, they will be considered exempt employees if they meet the white-collar exemption (including the salary threshold) or qualify under the ministerial exemption, as explained in Question #4. Many missionaries may qualify under the ministerial exception, depending on the extent to which their work is religious (e.g., worship, preaching, prayer, teaching).

Fourth, note that foreign countries' laws may impose overtime and other legal requirements for missionaries while they are working there.

Fifth, and last, deputized support practices can produce variations in pay, and consequently, uncertainty regarding the salary threshold qualification. Because of pay practices, is possible for a *non-exempt* deputized employee to receive more than the salary threshold in some weeks and less than that amount in other weeks. Thus, in a week when more than the salary threshold is received, the employee is not entitled to any overtime pay while working the U.S. In a week when less than the salary threshold is received, the employee is entitled to overtime compensation (with accompanying record-keeping considerations).

CATEGORICAL EXEMPTIONS

QUESTION 8

Are teachers and other employees working in schools exempt from the FLSA?

8 Q. Are teachers and others employees working in schools exempt from the FLSA?

A. Yes, and maybe.

Teachers are categorically exempt from the FLSA, provided that they are bona fide. To satisfy this exclusion, these employees' primary duty must be to teach, and they must be engaged in this activity in an educational establishment. Teachers are therefore not required to meet any salary threshold.

Under federal regulations, a bona fide teacher is engaged primarily in "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge." (See 29 CFR 541.303(a).) Exempt teachers include "regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; home economics teachers; and vocal or instrumental music instructors." (See 29 CFR 541.303(b).)

Notably, this regulation provides that teachers who spend considerable time in extracurricular activities still meet this exclusion. The requisite "educational establishment" includes elementary and secondary schools as determined under state law (and thus possibly kindergarten and pre-school too), institutions of higher learning, special schools for disabled or gifted children, and possibly post-secondary career programs (particularly if they are licensed or nationally accredited). (See 29 CFR 541.204(b).)

Employees engaged in academic administrative functions may be exempt as well, provided that (a) they receive a salary at least equal to the entrance salary for teachers at their school, and (b) their primary duty is performing administrative functions directly related to academic instruction or training in the school. (See 29 CFR 541.204(c).) Such employees may include the superintendent or other head of a school, any assistants responsible for administration of such matters as curriculum and testing, principals, vice-principals, department heads, academic counselors, and coaches (if their primary duty is teaching students, including sports instruction). Employees involved with other school aspects such as building management and maintenance, student health, social work, and food preparation do not qualify for this categorical exclusion.

CATEGORICAL EXEMPTIONS

QUESTION 9

Is there a seasonal
operations exemption?

9 Q. Is there a seasonal operations exemption?

- A.** Yes. As reflected in the [DOL's Fact Sheet #18](#) (available online), the FLSA provides an exemption from its minimum wage and overtime requirements for any workers employed by an establishment, such as an organized camp, nonprofit conference center, or recreational establishment, if “(A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33¹/₃ per centum of its average receipts for the other six months of such year.” An organization may thus meet this test in one of two ways—by operating for only part of the year, or per the prescribed formula. As with other exemptions, state law should be evaluated as well, and many states provide their own versions for both minimum wage and overtime requirements.

CATEGORICAL EXEMPTIONS

QUESTION 10

Could the seasonal operations exemption apply to a nonprofit with year-round activities?

10 Q. Could the seasonal operations exemption apply to a nonprofit with year-round activities?

- A.** Possibly. The legal question is whether the statutory term “establishment,” as set forth in Section 13(a)(3) of the FLSA could refer to an organization’s seasonal activities, even if such activities are only part of an internal program. In 2015, the federal Second Circuit Court of Appeals issued a decision in *Chen v. Major League Baseball* (No. 14-1315-cv, 2015 WL 4772359), addressing this question specifically and ruling in favor of such interpretation. It is therefore quite instructive.

The case arose from the MLB’s one-week FanFest, which MLB advertised as an “interactive baseball theme park,” held during the week preceding the MLB’s All-Star Game in New York’s Javits Center. Plaintiff Chen was a worker who sued under the FLSA. On appeal, the appellate court determined that Congress intended the term “establishment” to mean a “distinct physical place of business,” and that the FLSA regulations fit such a definition. Since the Javits Center was a distinctly separate place of business from MLB’s corporate office, and that the recreational nature of FanFest’s activities fit within the intention of the FLSA exemption, such exemption applied. Consequently, as the court explained, even an entity that operates year-round may operate a discrete “seasonal establishment” if it is distinct from its other operations.

Note that this decision is technically only applicable within the Second Circuit, which encompasses New York, Connecticut, and Vermont. In addition, other state laws may apply, dictating a different outcome. Employers seeking to come within this exclusion, or a corresponding state law exclusion, should be very careful to keep such seasonal operations quite distinct and separate.

A related alternative may be to form a separate corporate entity for such seasonal operations, such as a wholly controlled LLC subsidiary. Keep in mind, however, that the FLSA defines the term “employee” quite broadly. Depending on structural safeguards and actual operations, workers could be viewed as employees of both entities.

CATEGORICAL EXEMPTIONS

QUESTION 11

Is there an exemption
for interns?

11 Q. Is there an exemption for interns?

- A.** Unpaid interns are volunteers, and therefore the FLSA does not apply. Outside of the college and university educational context, paid interns are employees subject to FLSA coverage. Overtime requirements thus apply (unless other specific exemptions may be utilized, such as the teacher or ministerial exemptions) for any paid interns who work more than 40 hours in a work week.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 12

May employees covered under
the FLSA donate or volunteer time
for their employer?

12 Q. May employees covered under the FLSA donate or volunteer time for their employer?

- A.** Yes, but be careful! Employees who engage in volunteer work that is identical or similar to their regular work duties are not “volunteering.” They are working, and so they must be paid accordingly. For example, a church office worker who gets paid under the FLSA salary threshold and helps provide extra administrative support for the church’s Vacation Bible School program may not do so as a volunteer. He or she must be paid overtime if VBS involves more than 40 hours of work during a week. On the other hand, such worker who helps out with music or crafts for VBS may well be providing volunteer services, so long as such activities are distinctly different from his or her regular job duties.

Be careful that as an employer, the organization’s leadership does not communicate that any such “volunteering” is mandatory or otherwise expected. Again, such activities would then constitute work for which compensation—including possible overtime pay—would be owed.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 13

How do FLSA overtime requirements apply to non-exempt employees when they perform occasional duties away from the office or other regular work site, such as checking email and making phone calls?

13 Q. How do FLSA overtime requirements apply to non-exempt employees when they perform occasional duties away from the office or other regular work site, such as checking email and making phone calls?

A. Many currently exempt employees in low-budget nonprofits, such as executive directors and other personnel with extensive managerial responsibilities, may become “non-exempt” simply because of the salary threshold—and therefore subject to overtime pay requirements. If an organization is firmly committed to never paying overtime, part of the answer may be to inform these employees that their expected 40-hour work week should be divided between time in the office or work site and the time spent on out-of-office emails and calls. All time spent for work, both in the office and out of the office, counts toward the 40-hour total and any potential overtime hours. In taking this approach, employees must be responsible for reporting all of their time worked, and overtime pay may be occasionally owed. In addition, employers must provide very clear guidance about written record-keeping requirements, along with follow-through supervision and monitoring.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 14

Does non-exempt employees' time spent traveling count for purposes of overtime pay?

14 Q. Does non-exempt employees' time spent traveling count for purposes of overtime pay?

- A.** It depends. According to the [DOL's Fact Sheet #22](#) (available online), all time spent for travel all in one day should be compensated as "work time" (excluding any time for the employee's normal work commute). For overnight and other travel, the DOL considers only time spent traveling during "normal working hours" as work time, and that phrase may be subject to the organization's interpretation. As a policy matter, it may not be well received that employees must travel on their own time, so employers may wish to adjust compensation and scheduling in light of such considerations. Also, if an employee is traveling outside of such "normal working hours" but is engaged in work activities (e.g., preparing for a board meeting while flying on a plane), then he or she should be considered to be working.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 15

If an organization requires written approval for overtime hours (in policy and practice) and a non-exempt employee works overtime without receiving such approval, is the organization still liable for overtime pay?

15 Q. If an organization requires written approval for overtime hours (in policy and practice) and a non-exempt employee works overtime without receiving such approval, is the organization still liable for overtime pay?

A. Yes. Non-exempt employees who work overtime—that is, more than 40 hours per week—are legally entitled to overtime pay. However, such employees may otherwise be subject to disciplinary action for violating the employer’s directions about mandatory approval for overtime hours. In such event, an employer should diligently avoid any actions that could be construed as illegal retaliation for the employee’s overtime claim. Further investigation, employee and supervisory training, and related documentation thus may be appropriate in connection with such issues.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 16

May a non-exempt employee receive
“comp time” instead of overtime pay?

16 Q. May a non-exempt employee receive “comp time” instead of overtime pay?

- A.** No. A non-exempt employee is not allowed any “comp time”—that is, time off given in one week to compensate for extra hours worked in another week. For example, an employer could not require an employee to work 50 hours one week and 30 hours the next week, without resulting overtime pay (i.e., the 10 hours worked the first week “comp’d” in the second week). Rather, the employer would owe overtime pay for 10 hours the first week (plus regular pay), and then regular pay for 30 hours worked the second week.

**NON-EXEMPT/COVERED EMPLOYEES –
DETERMINING WHETHER OVERTIME
WAGES ARE OWED**

QUESTION 17

May additional paid leave be used
to offset overtime?

17 Q. May additional paid leave be used to offset overtime?

- A.** This question is closely related to the “comp time” Question #16, with the same answer—No. Non-exempt employees must be paid overtime whenever they work more than 40 hours in a work week.

REPORTING AND RECORD-KEEPING

QUESTION 18

Is it possible to pay a salary to non-exempt employees, and just have them verify that no overtime hours were worked?

18 Q. Is it possible to pay a salary to non-exempt employees, and just have them verify that no overtime hours were worked?

A. Yes—that approach may be appropriate, depending on the circumstances. Using that approach, the employer should make sure that its employees clearly understand their work hour expectations, that they know to report any overtime worked (and how to do so), and that they do not otherwise actually work any overtime. Such verification should be periodic, such as semi-annually, monthly, or even per each pay period. Simple verification and overtime reporting forms may be provided for the employee to sign (or to communicate via email), which should be stored in the employer’s personnel files (in case of any later question). These matters may also be appropriate for addressing in an updated employee handbook.

REPORTING AND RECORD-KEEPING

QUESTION 19

Are non-exempt employees who work occasional overtime required to track their hours just when they actually work overtime or continually?

19 Q. Are non-exempt employees who work occasional overtime required to track their hours just when they actually work overtime or continually?

A. An employer's best defense against a potential wage claim is time records maintained contemporaneously. As a practical matter, however, it may be most efficient to track overtime hours only when they are actually worked. Accordingly, the above verification approach may be appropriate in many circumstances. For employees who occasionally work overtime (e.g., one week per month), continued record-keeping may be advisable. With respect to special events such as annual conferences or a one-week ministry trip, it may be advisable to maintain records of work hours only for that specific time period (including preliminary preparation work that involves additional work hours). In any potentially problematic work situations, such as where employees are not expected to follow through responsibly in such matters or where supervision is subpar, it may be most appropriate simply to maintain time records for all non-exempt employee work performed.

REPORTING AND RECORD-KEEPING

QUESTION 20

May an organization adjust its definition of “work week” from time to time or among individual employees?

20 Q. May an organization adjust its definition of “work week” from time to time or among individual employees?

- A.** According to the [DOL’s Fact Sheet #23](#) (available online), an employer may provide its own defined work week period so long as it is fixed and regularly recurring—i.e., seven consecutive 24-hour periods. The employer’s work week thus may begin on any day and at any hour of the day. In addition, different work weeks may be established for different employees or groups of employees.

REPORTING AND RECORD-KEEPING

QUESTION 21

May an employer adjust non-exempt employees' daily schedules within a work week to prevent any overtime obligation?

21 Q. May an employer adjust non-exempt employees' daily schedules within a work week to prevent any overtime obligation?

- A.** Yes. Within a specified work week, an employer may allow for flexibility in a non-exempt employee's schedule. (This is not "comp time.") For example, an employee might work an extra 1 hour for 4 work days one week, for a total of 9 hours per day, then only a 4-hour day on the fifth work day of the same week. The employee would thus work a total of 40 hours that week, with no overtime pay owed. An employer and employee may also provide for higher pay during weekends, nights or holidays, as a matter of private contractual arrangement.

Note that additional meal and rest breaks requirements may apply for longer days worked, under state wage laws. Rest periods of 20 minutes or less are customarily treated as work time. Bona fide meal times (typically 30 minutes or more) are not, provided that the employees are fully relieved of any work duties during such periods.

REPORTING AND RECORD-KEEPING

QUESTION 22

How should an employee's regular rate of pay be calculated (for purpose of potential overtime pay at 1½ times the regular rate)?

22 Q. What is included in an employee's regular rate of pay, for purpose of potential overtime pay at 1½ times the regular rate?

- A.** Per the [DOL's Fact Sheet #23](#) (available online), the regular rate of pay consists of all financial remuneration for employment (including the reasonable cost to the employer or fair market value of goods or facilities furnished to the employee), on the basis of the average hourly rate derived from all earnings. Notably, the regular rate of pay does not include pay for expenses incurred on the employer's behalf, premium payments for overtime work, other higher-level pay such as for holiday work, discretionary bonuses, gifts, and vacation or sick leave. The employee's regular rate of pay also may not be less than the minimum wage, as prescribed by federal and state law.

REPORTING AND RECORD-KEEPING

QUESTION 23

How should non-exempt employees' overtime pay be calculated?

23 Q. How should non-exempt employees' overtime pay be calculated?

- A.** If an employee is paid hourly, the answer is simple: 1.5 times the employee's hourly pay rate. The same answer applies if the employee is salaried but has a prescribed, set number of expected hours to be worked each week. Note, however, that if the salaried employee's hours are expected to fluctuate, then the employer has two options. First, the employer may divide the employee's weekly salary amount by the number of hours actually worked each week, to obtain the effective hourly rate, and then pay 0.5 of such hourly rate. Second, to avoid such weekly computations, the employer may choose instead to pay the extra 0.5 based on the salary divided by 40 hours. Under both approaches, the "time" part of the mandatory "time-and-a-half overtime pay is considered to be included in the employee's salary amount, so the employer will owe only the extra half of the employee's hourly rate for overtime work (along with the employee's usual salary). An employer should carefully document such approach and communicate accordingly with its employees, for optimal legal compliance and employee understanding. For more information, please see <http://www.nonprofitcpa.com/what-exactly-is-time-and-a-half-pay-the-answer-may-be-surprising/>.

For more information, check out ECFA's webinar on this topic presented by attorneys Susan Campbell of Colorado Springs and Sally Wagenmaker of Chicago:
<https://www.ecfa.org/WebinarRecordings.aspx?ProductID=85>

ADDITIONAL RESOURCES

<http://www.nonprofitcpa.com/effective-date-looms-new-overtime-pay-rules-bmw/-creates-new-resource-help-nonprofits-comply/>

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