



OVERTIME COMPLIANCE TIPS

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OVERTIME LABOR LAW

6 compliance tips to avoid overtime lawsuits, wage-and-hour labor audits and FLSA exemption mistakes

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TIP #1: Determining Exempt vs. Nonexempt Status

When a new hire comes on board, you must determine whether to classify him or her as exempt or nonexempt under the FLSA.

The key consideration: Exempt workers aren't eligible for overtime pay. Rather, they're paid for the job they do, not the hours they keep.

Generally, two requirements must be met before you can classify someone as exempt:

1. You pay the worker on a salary basis.
2. The worker holds a position with certain duties designated by the DOL as appropriate for exempt status. These positions include executive, administrative, professional, computer and outside sales as well as some highly compensated workers.

Remember: An exempt worker must meet both the salary and the duties tests.

Every employer should regularly review job descriptions to ensure all workers are classified properly. You could do this annually in conjunction with performance appraisals for current employees. Compare their job descriptions to the exemptions allowed by the DOL. Then specify in every job description whether the position is exempt from overtime or is hourly, nonexempt.

When you create a new position, consider the implications of the classifications. If you can design the job to fit an exemption, do so. That may mean raising the minimum salary to meet the test or adding a minimum education requirement that qualifies the position for the administrative or professional exemption.

Also, some states have more generous overtime rules than the federal ones. So, be sure to check with your state labor department before making changes to employee overtime classifications.

Salary Basis

Being paid on a salary or fee basis is the quid pro quo of exempt employees. They aren't paid overtime for working more than 40 hours a week; in exchange, their employer must provide a guaranteed salary, which can't be reduced when they work fewer than 40 hours. This reflects the understanding that exempt employees have the discretion to manage their time and are not answerable for hours worked or the number of tasks performed. Rather, they're paid for the general value of the services they provide. In addition, you may not deduct pay for time when work isn't available if the salaried worker is ready, willing and able to work.

Other characteristics of being paid on a salary basis:

- You pay the employee a set salary even if she works only part of the week.
- You can't dock her pay as a disciplinary measure unless the employee has committed a serious safety infraction (breaking a rule designed to prevent endangering the facilities or other workers). The DOL regulations state that you may deduct for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules," such as sexual harassment or workplace violence. (You'll need, however, a written policy that you apply uniformly to all workers.)
- The employee can't be docked for a partial-day absence.
- You must pay the employee for any day he's ready, willing and able to work.

Make sure you abide by the salary rules. If you don't, the employee is no longer exempt, no matter what his duties and responsibilities are. Destroying his exemption can make you liable for two years' overtime pay for any hours worked beyond 40 per week.

Nonexempt: Blue-Collar Workers, First Responders

Some workers will be entitled to overtime no matter how highly compensated they are. Under the regulations, workers who "perform work involving repetitive operations with their hands, physical skill and energy" can't be classified as exempt. If you have workers who gain the skills and knowledge required for their jobs through apprenticeships and on-the-job training, they're probably entitled to overtime.

The regulations list examples of such blue-collar jobs:

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|---|--------------|---|-----------------------------------|
| ✓ | Carpenters | ✓ | Iron workers |
| ✓ | Electricians | ✓ | Craftspeople |
| ✓ | Mechanics | ✓ | Longshoremen |
| ✓ | Plumbers | ✓ | Construction workers and laborers |

In addition, most people involved in law enforcement will continue to be eligible for overtime pay, including police officers, detectives, deputy sheriffs, state troopers, investigators, correctional officers, parole and probation officers, park rangers, firefighters, paramedics, emergency technicians, ambulance personnel and rescue workers.

TIP #2: The Duties Tests

Workers who earn at least \$455 per week or \$23,660 per year (**\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020**) may be exempt from overtime pay if they meet the appropriate tests for their classification: executive, administrative or professional. The last category is subdivided into learned professional and creative professional. In addition, special tests control the classification of certain computer employees and outside sales employees.

'Highly Compensated Worker' Exemption

The DOL rules also feature an exemption category for "highly compensated employees." Essentially, any employee earning more than \$100,000 per year (**\$107,432 under new rules to take effect January 1, 2020**) and who regularly performs even one of the exempt duties of an executive, administrative or professional employee is precluded from earning overtime. To qualify as a highly compensated exempt employee, the person must meet the following tests:

- Earns total annual compensation of \$100,000 per year
- Primary duty includes performing office work or non-manual duties.
- Customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly compensated executive if she customarily and regularly directs the work of two or more other employees, even though the employee doesn't meet all the other requirements in the standard test for exemption as an executive.

Test your compliance now

To be considered exempt from overtime, an employee must generally be paid on a salary basis and his or her job duties must meet the DOL's standards for one of the six exemption categories discussed below. Answer the following questions to determine whether you've misclassified a worker as exempt:

■ Executive Employee

1. Is the employee's primary duty managing the enterprise or a department or subdivision of the enterprise?
2. Does the employee customarily direct the work of two or more other employees or their equivalent?
3. Does the employee have the authority to hire or fire, and do her recommendations carry significant weight if unauthorized to make the final decision?
4. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (**\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020**) on a salary basis?

If you answered "No" to any of these questions, you may have misclassified the worker as an exempt executive.

Note: If the employee is at least a 20% owner of the business and meets requirements #1 and #2 above, he or she need not meet the salary requirement in #4 or the authority requirement in #3.

■ Administrative Employee

1. Is the employee's primary duty performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers?
2. Does the employee exercise discretion and independent judgment with respect to matters of significance? That is, does he or she evaluate and compare possible courses of action and then make a decision or recommendation after considering the various possibilities?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year (**\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020**) on a salary basis?

If you answered "No" to any of these questions, the employee may be misclassified as exempt administrative.

■ Learned Professional Employee

1. Is the employee's primary duty to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?

2. Is the advanced knowledge obtained by completing an academic course of study resulting in a four-year college degree or leading to certification?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year **(\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020)** on a salary basis?

If you answered “No” to any of these questions, the employee may be misclassified as an exempt learned professional. Exception: Those who have completed the educational requirements for a law or medical degree need not meet the minimum salary requirement. Also, teachers need not be certified or meet the minimum salary requirement to qualify as learned professionals.

■ Creative Professional Employee

1. Is the employee’s primary duty to perform work requiring invention, originality or talent in a recognized field of artistic endeavor such as music, writing, acting and the graphic arts?
2. Does the work require more than intelligence, diligence and accuracy (i.e., does it require “talent”)?
3. Is the employee paid the equivalent of at least \$455 per week or \$23,660 per year **(\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020)** on a salary basis?

If you answered “No” to these questions, you may have misclassified a worker as an exempt creative professional.

■ Computer Professional

- Is the employee paid at least \$455 per week or \$23,660 per year **(\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020)** on a salary or fee basis?

Is the employee’s primary duty:

1. Application of system analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or
2. Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
3. Design, testing, documentation, creation or modification of computer programs related to machine operating systems; or

4. A combination of the aforementioned duties requiring the same level of skills?

If you answered “No” to #1 or were unable to answer “Yes” to any parts under #2, you may have misclassified the worker as an exempt computer professional.

■ **Outside Sales Employee**

- Is the worker’s primary duty making outside sales?
- Does he or she regularly work away from the company’s place of business?
- Does the worker sell tangible or intangible items, such as goods, insurance, stocks, bonds or real estate, or obtain orders or contracts for services or the use of facilities?

If you answered “No” to any of these questions, you may have misclassified the worker as an exempt outside sales employee.

‘Fee Basis’

Administrative, professional and computer employees may be paid on a “fee basis” rather than on a salary basis. If an employee is paid an agreed sum for a single job, regardless of the time required to complete it, the person will be deemed paid on a “fee basis.”

A fee payment is generally paid for a unique job rather than for a series of jobs repeated a number of times and for which identical payments are repeatedly made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and whether the payment is at a rate that would amount to at least \$455 per week or \$23,660 per year **(\$684 per week or \$35,568 annually under new rules to take effect January 1, 2020)** if the employee worked 40 hours.

TIP #3: Computing Overtime

You must pay overtime to every nonexempt employee who works more than 40 hours in a single workweek. The overtime rate is one and a half times an employee’s hourly rate. If an employee earns a fixed hourly rate with no other compensation, computing her base rate is easy. But in many cases, it’s not so simple:

- **Fixed hourly rate plus other pay:** Divide the employee's total earnings for the week (hourly wages plus bonus, for example) by his total hours of work.
- **Different rates in the same week:** Divide total earnings for the week by the employee's total number of hours worked.
- **Pieceworkers:** Add the total earnings for the workweek (including bonuses) and any sums paid for waiting time or other hours worked. Then divide the sum by the number of hours worked in that week.
- **Workers on day rates or job rates:** When you pay an employee a flat sum for a day's work or for doing a particular job (regardless of the number of hours) and he receives no other form of compensation, total all sums received at such day rates or job rates in the workweek. Then divide by the total hours worked.
- **Salaried workers whose pay covers more than a workweek:** You can convert a monthly salary to its equivalent weekly wage by multiplying the salary by 12 months and dividing it by 52 weeks.
- **Fixed salary for fluctuating hours by agreement with employee:** Divide the salary by the number of hours worked in that week. Because you already paid straight time, the employee must receive additional pay for each overtime hour worked that week, at not less than one-half the regular rate.

TIP #4: Other Pay Considerations

Travel Time

Many nonexempt (hourly) employees are entitled to pay for time spent traveling. Some general guidelines:

- **Travel between home and work.** Regular commuting back and forth to work doesn't count as paid time unless the employee performs work en route. Travel time does count, though, when an employee must travel a substantial distance for an emergency job at a customer's premises.
- **Travel as a regular part of the job.** When an employee's duties regularly involve travel, you must count that as paid time.
- **One-day travel assignments.** You must count all such time as work, except meal periods and the ordinary commute.
- **Extended trips.** Travel during normal working hours, no matter the day of week, counts as work time.

In addition, the time an employee spends waiting for work counts as paid time: for example, when an administrative assistant waits for her boss to give her an assignment or a mechanic stands around while a machine's being repaired. Both have been "engaged to wait": Their employers require them to be present even though they may not have tasks available for the entire shift.

Thanks to a recent decision in a class action case, it's now clear that if you have employees report to their regular workplace location in response to a call, they aren't entitled to extra pay for their trip time. That's counted as regular commuting time, which is always unpaid. Your organization can take advantage of this rule only if the employees report directly to their regular workplace first. If you send them to another location (such as a customer's property), you must pay for their travel time.

Sleeping Time

In certain circumstances, you must pay for the time an employee working an extended shift spends sleeping. If she's on duty fewer than 24 hours, the entire period counts as work time even though she may sleep or engage in other personal activities during her shift. If the shift extends beyond 24 hours, you and the employee may agree to exclude meal periods and sleeping periods of not more than eight hours from her hours worked.

You may also exclude sleeping periods of not more than eight hours per day if you provide adequate sleeping facilities and allow for uninterrupted rest. But when the job interrupts an employee's sleep, you must count each interruption as paid time. If an employee can't get at least five hours' sleep, you must pay for the entire period as time worked.

Training Programs and Lectures

You must pay an employee for time spent attending training programs and lectures unless the following apply:

- Attendance is outside regular working hours.
- Employees don't perform any productive work during the sessions.
- The program doesn't directly relate to their jobs.
- Attendance is voluntary.

If you give employees the impression that they must attend or risk losing their jobs, their attendance isn't considered voluntary. If the training is intended to help an employee perform her job better, it's directly related to her job. But if the purpose is to upgrade an employee's skills in hopes of advancement—and you haven't required her to attend—you don't have to pay her for training time.

What about any hours spent in an apprenticeship program? Usually, you can exclude this period from paid time if the apprenticeship meets the standards of the DOL's Bureau of Apprenticeship and Training and the instruction doesn't involve productive work or performing regular duties. You must count instruction time, however, if the written agreement specifically provides for it.

Civic and Charitable Work

The DOL regulation defines civic and charitable work as “hours of service for a public agency for civic, charitable or humanitarian reasons.” Examples include volunteering for nonprofit organizations such as food banks, churches and religious organizations, and fund-raising events designed to raise money for disease research and the like.

Essentially, you must pay for hours spent on civic or charitable work if:

- The activity takes place during normal business hours or
- If outside normal work time, it's the same type of work the employee would do as part of her job or
- You require employees to participate.

You needn't pay for civic or charitable work if:

- You don't require participation or penalize those who don't.
- The work doesn't occur during normal work hours.
- The duties performed are outside their normal work duties.

TIP #5: Tracking Exempt Employees' Hours

You also may want to track the number of hours exempt employees work just in case you didn't correctly classify someone. Why? Because if the employee is reclassified as hourly, you must be able to show how many hours he worked. If you can't, a court may force you to accept the employee's inflated estimates.

Nothing in the law prevents you from requiring all employees (exempt and nonexempt) to record their hours by punching a time clock or filling out a time sheet. That way, you'll have the records in case you need them. Just make sure you don't base exempt employees' compensation on those hours, or you will jeopardize their exempt status.

Tracking actual hours worked may turn out to be useful if you end up converting employees who are currently exempt into hourly workers when the new regulations take effect. You will have to estimate how many hours the exempt employees are putting in to determine what their new base hourly rate will be. For example, if exempt managers are now working on average 60 hours per week, and you expect them to continue at that pace, you will have to calculate what the hourly rate should be for the first 40 hours and the anticipated extra 20 hours at the 1.5 times base hourly pay rate to end up paying the newly hourly employees approximately the same.

TIP #6: What to Do in Case of an Audit

Suppose an employee has complained to the DOL about possible wage-and-hour or overtime violations in your workplace. Once you've been notified that an auditor is coming, get prepared by conducting your own audit.

DOL auditors have plenty of latitude to inspect records and interview employees, so make sure you've done everything possible to discover and correct any compliance problems as well as gather documents to defend your decisions.

If faced with an audit, you should:

- Review the differences between federal and state overtime labor laws to ensure you're complying with the stricter of the two.
- Reread the job descriptions of any positions that might be in question. Interview people in those jobs and their supervisors to ensure their job descriptions are accurate. Find out what the workers actually do, and check timekeeping records. Promptly correct any errors.
- Interview exempt employees to find out how much time they spend on duties typically done by hourly employees. If it's more than 20% (or in retail, 40%), consider reclassifying the employee as nonexempt. (There's no liability in classifying too many people as nonexempt; it's the opposite that plunges employers into hot water.)
- Check to see that employees are performing their jobs as assigned and working the hours designated by management. If they're not, insist they start doing so.
- Train supervisors and managers on how to determine who's an exempt employee and who's not.
- Check your overtime records. If you discover unpaid overtime, pay it immediately—even if the overtime wasn't approved.
- Review your policy manual with an experienced employment attorney to make sure it's complete and in line with the law.
- Enlist help with all of this from a consultant or attorney. Many of the regulations are difficult to interpret, and the wrong call could cost you plenty.

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Maternity Leave Laws: 7 guidelines on pregnancy discrimination law, state maternity regulations, pregnancy disability leave, plus a sample maternity leave policy

It's important to know what you must do—and what you can't do (or say)—under federal anti-discrimination and maternity leave laws. And it's vital to double-check state maternity leave statutes, which may provide more liberal leave benefits. While no federal law requires you to provide paid maternity leave, most employers must comply with the pregnancy discrimination law and FMLA maternity leave regulations. Here are 7 guidelines on how best to comply with maternity leave laws, plus a sample leave policy you can adapt for your own organization.

www.businessmanagementdaily.com/MaternityLeaveLaws

The Office Organizer: 10 tips on file organizing, clutter control, document management, business shredding policy, record retention guidelines and how to organize office emails

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www.businessmanagementdaily.com/LeadershipTeamManagement

Employment Background Check Guidelines: Complying with the Fair Credit Reporting Act, conducting credit background checks and running a criminal check to avoid negligent-hiring lawsuits

Employment Background Check Guidelines shows employers and HR professionals how to properly conduct reference/background checks, select third-party background firms and why screening candidates online on social networking sites is legally risky business. Don't allow your organization to risk being held liable for "negligent hiring" or "failure to warn" should an employee turn violent on the job.

www.businessmanagementdaily.com/BackgroundCheckGuidelines

Salary Negotiating 101: 7 secrets to boosting career earnings, negotiating a raise and striking the best deal in a job offer negotiation

Think you deserve a raise, but are afraid to walk into your boss's office and ask? Don't let ineffective negotiation skills hold you back. Employees at all levels can boost their career earnings by following the rules on negotiating a raise, hashing out the best pay package in a job offer negotiation and knowing their market value.

www.businessmanagementdaily.com/SalaryNegotiating101

FMLA Intermittent Leave: 5 guidelines to managing intermittent leave and curbing leave abuse under the new FMLA regulations

One of the biggest employer complaints about the Family and Medical Leave Act (FMLA) is the productivity problems caused by employees' use—and abuse—of FMLA intermittent leave. The problem: Employees with chronic health problems often take FMLA leave in short increments of an hour or less. The Department of Labor took steps to help minimize workplace disruptions due to unscheduled FMLA absences by saying that, in most cases, employees who take FMLA intermittent leave must follow their employers' call-in procedures for reporting an absence. Amend your organization's policies, update your employee handbook and revisit how you track FMLA intermittent leave with these 5 guidelines.

www.businessmanagementdaily.com/FMLAIntermittentLeave

Overtime Labor Law: 6 compliance tips to avoid overtime lawsuits, wage-and-hour Labor audits and FLSA exemption mistakes

Employers, beware: The Department of Labor's Wage and Hour Division reports that wage-and-hour labor litigation continues to increase exponentially. Federal class actions brought under the Fair Labor Standards Act (FLSA) outnumber all other types of private class actions in employment-related cases. Use this special report, Overtime Labor Law: 6 compliance tips to avoid overtime lawsuits, wage-and-hour Labor audits and FLSA exemption mistakes, to review your overtime pay policy and double-check your FLSA exempt employees' status. Expecting a visit from a DOL auditor? Get prepared by taking the self-audit at the end of this report.

www.businessmanagementdaily.com/OvertimeLaborLaw

Office Communication Toolkit: 10 tips for managers on active listening skills, motivating employees, workplace productivity, employee retention strategies and change management techniques

A manager's job is 100 times easier and more rewarding when his or her employees are performing like a well-oiled machine. But when that machine runs slowly or breaks down entirely, a manager's job becomes exponentially harder. The best managers are the best listeners ... listen to our 10 tips and maximize office communication skills and bolster workplace productivity.

www.businessmanagementdaily.com/OfficeCommunicationToolkit

Workplace Violence Prevention Toolkit: HR advice, guidelines and policies to keep your workplace safe

Unfortunately, in the wake of a spate of workplace shootings, HR professionals and managers nationwide must consider the horrific possibility of violence erupting at their own facilities and events. To help employers prevent tragedy, this toolkit offers business advice, guidelines and policies aimed at keeping workplaces safe from employee violence. Learn prevention strategies, tips on identifying potentially violent workers, managerial advice on maintaining a safe workplace. It includes two sample anti-violence policies, adaptable for use in any company, plus checklists to use in case violence erupts.

www.businessmanagementdaily.com/WorkplaceViolencePrevention

14 Tips on Business Etiquette: Setting a professional tone with co-workers, clients and customers

For organizations and employees alike, recognizing the critical link between business protocol and profit is key to your success. Learn how to confidently interact with colleagues in ways that make you and your whole organization shine. Discover best practices on making proper introductions; cubicle etiquette; “casual dress” rules; handshake protocol; guest etiquette; workplace behavior faux pas; business dining etiquette, office wedding invites and other co-worker special occasions; business letter and email protocol—and even how your office decorations may affect your professional image.

www.businessmanagementdaily.com/BusinessEtiquette101

12 Ways to Optimize Your Employee Benefits Program: Low-cost employee incentives, recognition programs and employee rewards

If you've had to cut pay and staff and now expect more from those who remain, it's vital to revamp your employee recognition and rewards program. Employers can double their rewards and recognition efforts in innovative, cost-efficient ways with employee-of-the-month awards, employee incentive pay, employee appreciation luncheons, more time off, shopping sprees, wellness incentive contests, plus employee rewards customized to motivate Millennials, Gen Xers, Baby Boomers and the Matures. Now is the time to get clever with your employee recognition programs. This report shows you how with great ideas offered up from our [Business Management Daily](#) readers.

www.businessmanagementdaily.com/EmployeeBenefitsProgram

The Bully Boss Strikes Again! How to deal with bosses who make crazy requests

And you thought your boss was unreasonable? Bet he never asked you to perform oral surgery or fill in for the bomb squad. Talk about “other duties as assigned!” Even if your direct supervisor swamps you with petty tasks and doesn't appreciate all you do, you can always “manage up” to make sure the boss's boss knows your worth. This report includes practical advice on how to manage a toxic boss along with dozens of outrageous stories about bully bosses.

<http://www.businessmanagementdaily.com/BullyBoss>

Microsoft Email: Outlook Tips & Training: How to improve productivity by effectively employing under-used features already at your fingertips

We all use Outlook. It's easy. You can answer email, keep your appointments and your calendar, and save your files in various folders. But are you using it to manage your entire workflow? You can. Melissa P. Esquibel combines her 25+ years of experience in information technology with a background in training, technical writing and business risk analysis to move beyond email and help you understand Outlook's amazing workflow benefits. You'll discover how to get more out of Outlook than you ever dreamed possible with this hands-on road map to Outlook that can send your productivity skyrocketing.

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17 Team Building Ideas: The team building kit for managers with team building exercises, activities and games to build winning teams today!

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www.businessmanagementdaily.com/TeamBuildingIdeas

10 Time Management Tips: A how-to guide on efficiently managing your time through effective delegating, calendar management and using productivity tools

In this era of downsizing and the quest for efficiency, businesses of all sizes are asking employees to take on extra tasks to boost productivity. Has your job turned into one of those "stretch jobs"? If so, you may be looking for a better way to get more done in less time, reduce stress and stop burning the midnight oil. Read about calendar management, keyboard shortcuts, running productive meetings, setting up agenda templates and using tech tools for project management with these 10 time management tips. Learn to prioritize your tasks and stop working in a crisis mode all the time

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