



General Background Information on Overtime

Q: What laws require the payment of overtime?

A: The payment of overtime is required by both federal and state laws. The law requires most employers to pay overtime at the rate of 1.5 times the regular rate of pay for all hours worked over 40 in the workweek. Special rules apply to government agencies, hospitals, canneries and manufacturing establishments. See ORS 653.261; 29 USC § 207.

Q: Are certain employees exempt from the requirement to pay overtime?

A: Yes, there are numerous overtime exemptions under both federal and state laws. The most common exemptions are those pertaining to executive, administrative, and professional employees, also referred to as the “white collar” exemptions.

The current federal regulations that define exempt employees are in the Fair Labor Standards Act (FLSA) and are found at 29 CFR § 541.0-541.315. State definitions and regulations are found at ORS 653.020(3) and OAR 839-020-0004 (25), (29), (30) and OAR 839-020-0005.

Q: Are there new federal rules regarding overtime exemptions?

A: Yes, the new rules are scheduled to go into effect on August 23, 2004. Congress or the federal courts could delay this implementation date but it is best to plan to make decision on your staffing structure with this date in mind. The Bureau of Labor and Industries is currently analyzing the new federal rules that were published on April 23, 2004 to see what they mean for Oregon employers and employees. *See Final FLSA Rules, Federal Register, Federal Register, Vol. 69 No 79, April 23, 2004, Pages 22122 (final rules).*

BOLI will provide additional guidance on this topic in July 2004. Its Technical Assistance for Employers Unit (TA) will make sure that employers are informed about the changes and help them make sure they are in compliance with the new regulations and state law.

Q: Are there differences between the federal and state exemption laws regarding overtime?

A: Some. When there is a conflict between federal and state laws, employers who are subject to both ***must apply the standard most beneficial to the employee***. In general, Oregon law and regulations pertaining to exemptions were patterned after current federal regulations. So a new process of reconciling the two laws is being

conducted at this point. There are some differences between the new federal rules and Oregon statutes, particularly in regard to salary level and the new federal “highly compensated” employee definition.

Q: Are most employers subject to both the state and federal overtime exemption regulations?

A: Yes, almost all employers are subject to both state and federal laws, but there are notable exceptions. For example, some private sector employers that gross less than \$500,000 per year and employ employees who are not engaged in interstate commerce may be exempt from federal regulations.

State and local government employees are exempt from Oregon’s overtime rules if other provisions of law or collective bargaining agreements contain overtime provisions. See ORS 653.261(3). State law provides special rules relating to white collar employees of certain public agencies. See ORS 279.340 and OAR 839-020-0300 to -0350.

Q: Whose responsibility is it to decide whether an employee is exempt from overtime?

A: The U.S. Supreme Court has ruled that it is the employer’s responsibility to establish that the employees fit “plainly and unmistakably within the exemption’s terms.” Employers who misclassify an employee as exempt may be subject to substantial overtime liability. Misclassifications are largely due to the widespread misconception that an employee with a management title and/or who is paid a salary instead of an hourly rate is exempt.

Q: How do the “white collar” exemptions generally apply?

A: Both state and federal laws provide three main categories of “white collar” employees that may qualify for exempt status; executive, administrative, and professional employees. Within each category, an employee *must meet a combination* of duties tests and be paid on a salary basis before the employee may be classified as exempt from overtime and often minimum wage.

Duties Test: There are slightly different requirements under each exemption category. The new federal regulations still generally require that the employee’s *primary duties* require some elements of management or supervisory control over employees, or the exercise of discretion or independent judgment over the employer’s operations or customers before an employee may be considered exempt. An initial review of the new federal rules indicates that the federal rules are similar to current Oregon law in many respects but this review is ongoing. There are several sections where they are not similar and these are notable. The first is the new federal exemption for “highly compensated” employees which does not appear consistent with current duties test under Oregon law. The second is the elimination of the exercise of discretion and independent judgment duty test

for the Executive exemption. In addition, there are also several differences in the new federal definitions on when a white collar employee may be exempt and these are still being examined.

Salary Test: “White collar” employees must be paid on a salary basis in order to be exempt, with the exception of certain computer professionals. This is the most significant change in the federal rules. Given that the new federal salary level is \$455 or more a week, the federal level is clearly more beneficial for workers. *Employers will no longer be able to exempt employees from overtime unless they get paid on a salary basis and are paid at least \$455 a week or more.* These workers will also have to meet the more beneficial of the duties tests under state and federal law.

Oregon’s salary test is in state law so it will not change unless the Legislature passes a law amending the minimum salary statute. The current state salary level is \$276/week (determined using the current minimum wage rate as prescribed by statute). *As noted above, the higher federal salary is more beneficial to the employee so that is the level that employers will need to apply as of August 23, 2004.*

Q: What does the “white collar” law in Oregon say now?

A: ORS 653.020 states:

ORS 653.010 to 653.261 does not apply to any of the following employees:

(3) An individual engaged in administrative, executive or professional work who:

(a) Performs predominantly intellectual, managerial or creative tasks;

(b) Exercises discretion and independent judgment; and

(c) Earns a salary and is paid on a salary basis.

Q: Is Oregon required to conform its rules or law to the federal rules if they are enacted?

A: No. Oregon may continue to maintain its own current rules or adopt others within the current state law’s statutory framework whichever *rules, federal or state, are more beneficial to the employee will always apply* (as long as the employer is subject to both state and federal laws, as most are). *This is currently the case as employers have already had to read the laws together.* Now that the federal law is changing, BOLI is analyzing which rules are the most beneficial in order to help employers and employees meet their rights and responsibilities under both laws. This dual track is no different than what is currently required but the new rules require a new review.

Information On The Final Federal “White Collar” Rules

Q: What has the U.S. Department of Labor set forth in the final rules in terms of changes to its federal overtime exemption regulations?

A: In short, the final rule would make changes to both the duties and salary tests for “white collar” employees, although far fewer than the proposed rules would have. It is unclear how the final rule will impact certain workers and employers. Certain occupations or industry sectors may benefit more from the changes than others. The following is a summary of the proposed rule revisions:

Q: Do we know how many workers in Oregon this will impact or how it will impact Oregon businesses?

A: Workers: “Under the new FairPay rules, workers earning less than \$23,660 per year — or \$455 per week — are guaranteed overtime protection. This will strengthen overtime rights for 6.7 million American workers, including 1.3 million low-wage workers who were denied overtime under the old rules,” according to DOL’s website. See www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm

According to the Oregon Employment Department, Oregon has about 1.1 percent of the nation's salaried workers, and assuming that Oregon has a very similar share of the nation's salaried workers who earn between \$155 and \$455 per week, slightly more than 75,000 of Oregon's salaried workers would fall into the same category as the 6.7 million nationwide and thus be offered overtime protection. DOL does not give any estimates for how many workers would lose overtime protection under the new rules, other than for the “highly compensated” category, so that is still an unknown for Oregonians.

Business: According to the Oregon Employment Department, Oregon’s share of the costs and benefits show about \$4.2 million in additional annual payroll costs, \$8.3 million one-time implementation costs, and \$2.8 million annual savings. Thus, the net cost to the Oregon business sector is expected, based on DOL statements and reasonable assumptions, to be around \$1.4 million per year after the first year's \$8.3 million implementation cost. Overall private sector covered payroll in Oregon was about \$43.7 billion in 2002, so this \$1.4 million would be an increase in cost of about 0.003 percent (three one-thousandths of one percent) of total private sector covered payroll, or three 100-thousandths of total private sector covered payroll.

These estimates were done by looking at some of the costs and benefits DOL identified in the April 23, 2004 Federal Register with the final rule and applying the same 1.1 percent factor to generate rough estimates of Oregon businesses' shares of the nationwide costs and benefits.

Excerpts from DOL Fact Sheets #17A-H: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide [executive](#), [administrative](#), [professional](#) and [outside sales](#) employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. Section 13(a)(1) and Section 13(a)(17) also exempt certain [computer](#) employees.

I. General Definitions

A. Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

Factors to consider include, but are not limited to: whether the employee:

- ◆ Has authority to:
 - ◆ Formulate, affect, interpret, or implement management policies or operating practices;
 - ◆ Carry out major assignments in conducting the operations of the business;
 - ◆ Commit the employer in matters that have significant financial impact;
 - ◆ Waive or deviate from established policies and procedures without prior approval; or other factors set forth in the regulation.

- ◆ Performs work that affects business operations to a substantial degree.

B. Highly Compensated Employees

The regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(17) if:

1. The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee 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 the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

C. Matters of Significance

“Matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

D. Minimum Standard – See Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

E. Primary Duty - “Primary duty” means the principal, main, major or most important duty that 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 employee’s job as a whole.

F. Salary Test: The department’s proposal would increase the minimum “salary” requirement part of the test that allows employers to classify employees as exempt from \$155 a week to \$455 a week. This is the largest increase in the salary threshold since the FLSA was enacted by Congress in 1938. This would mean that an employee would have to make at least \$23,660 annually before the “white collar” exemption could possibly be

applied. *If employers do not increase the salaries of workers who are currently classified as exempt and making less than \$455 a week, then the employees would be entitled to overtime if the rule is implemented.*

II. Executive Exemption

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

- The employee must be compensated on a [salary basis](#) (as defined in the regulations) 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.

Management

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Two or More

The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight

Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

III. Administrative Exemption

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.

Directly Related to Management or General Business Operations

To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

IV. Professional Exemption

A. **Learned professional** employee exemption must meet all of the following tests:

- 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.

Work Requiring Advanced Knowledge

“Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

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.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

B. The **creative professional** employee exemption must met all of the following tests:

- 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 invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, music, writing, acting and the graphic arts.

V. Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a [salary](#) or fee basis (as defined in the regulations) at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) The 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;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

VI. Outside Sales Exemption

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

- The employee's primary duty must be making sales (as defined in the FLSA), 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; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

VII. Where to Obtain Additional Information on Federal Final Rules

The Department of Labor provides this information to enhance public access to information on its programs. This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

See specific fact sheets at www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm in this series for more detailed information on the specific exemptions for executive, administrative, professional, computer, and outside sales employees, and for more information on the salary basis requirement.

For more information regarding the FLSA, visit the Wage and Hour Division's Web site at www.dol.gov/esa/whd/ or call our toll-free help line, available from 8 a.m. to 5 p.m. in your time zone, at 1-866-4US-WAGE (1-866-487-9243).

Additional Resources:

Federal Resources

1. Final FLSA Rules, Federal Register – Vol. 69 No 79, April 23, 2004, Page 22122:
a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/pdf/04-9016.pdf
2. U.S. Department of Labor Power Point Materials on New Final FLSA Rules:
www.dol.gov/esa/regs/compliance/whd/fairpay/presentation.ppt
3. U.S. Dept. of Labor, FairPay Fact Sheets:
www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm
4. Current Developments, Thompson Publishing Group:
www.thompson.com/hp_newsbriefs/archive/040423_wagehour.html

State Resources - Bureau of Labor and Industries

1. Wage and Hour Division – For Employees:
www.oregon.gov/boli/whd/index.shtml
2. Technical Assistance for Employers Unit:
www.oregon.gov/boli/ta/index.shtml

Ask BOLI Email – Boli.Mail@state.or.us.

Call BOLI Technical Assistance at (971) 673-0824