

Overtime Compensation Under the Fair Labor Standards Act



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

WH Publication 1325
Revised April 1985

Material contained in this publication is in the public domain and may be reproduced, fully or partially, without permission of the Federal Government. Source credit is requested but not required. Permission is required only to reproduce any copyrighted material contained herein.

This material will be made available to sensory impaired individuals upon request.
Voice phone: 202-523-8347
TDD* phone: 202-523-9530

NOTE

While the Fair Labor Standards Act does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the Act does not regulate. For example, the Act does not require:

- vacation, holiday, severance, or sick pay
- meal or rest periods, holidays off, or vacations
- premium pay for weekend or holiday work
- pay raises or fringe benefits
- a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- any limit on the number of hours of work for persons 16 years of age and over

These and similar matters are determined by agreement between the employer and the employees or their authorized representatives.

This publication is for general information and is not to be considered in the same light as official statements of position contained in Interpretative Bulletins and in opinion letters of the Wage and Hour Administrator.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

OVERTIME COMPENSATION
UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act contains provisions and standards concerning minimum wages, equal pay, overtime pay, recordkeeping, and child labor. These basic requirements apply to employees engaged in or producing goods for interstate commerce, and to employees in certain enterprises, including employees of state and local governments. The Act is administered by the U.S. Department of Labor's Wage and Hour Division.

If you have specific questions about the Act's requirements, contact the Wage and Hour Division's nearest office. Offices are listed in the telephone directory under Department of Labor in the U.S. Government listing.

THE OVERTIME PAY REQUIREMENTS

Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 at a rate not less than time and one-half their regular rates of pay. There is no limitation in the Act on the number of hours employees may work in any workweek. They may work as many hours a week as they and their employer see fit, as long as they are paid in accordance with the Act's requirements. The Act does not require overtime pay for hours in excess of eight per day (there is one exception) or for work on Saturdays, Sundays, holidays, or regular days of rest as such, although many companies do pay overtime for such hours.

Each Workweek Stands Alone: The Act takes a single workweek as its standard and does not permit averaging of hours over two or more weeks. For example, an employee who works 30 hours one week and 50 hours the next, must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40 (except for certain employees of hospitals, residential care establishments, fire fighters, and police officers) This is true regardless of whether the employee works on a standard or swingshift schedule and regardless of whether payment is on a daily, weekly, bi-weekly, monthly, or other basis. This rule also applies to employees paid on a piecework basis or commission.

Determining the Workweek: An employee's workweek is a fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. A single workweek may be established for a plant or other establishment as a whole, or different workweeks may be established for different employees or groups of employees. Once beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act.

Time of Payment: There is no requirement that overtime compensation be paid weekly. The general rule is that overtime pay earned in a particular workweek must be paid on the regular pay day for the period in which the workweek ends. If the correct amount of overtime pay cannot be determined until some time after the regular pay period, the employer must pay the overtime compensation as soon after the regular pay period as practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment and in no event may payment be delayed beyond the next pay day after such computation can be made.

REGULAR RATE OF PAY

Before overtime pay can be computed it is necessary to determine the employee's regular rate, since the Act requires payment for overtime hours at not less than one and one-half times the regular rate of pay. The regular rate may be more than the statutory minimum (currently \$2.90 an hour) but it cannot be less. (On January 1, 1980, the minimum wage increases to \$3.10 per hour and on January 1, 1981 to \$3.35 per hour.) The regular rate includes all remuneration for employment except for certain payments excluded by the law itself. Payments which are not part of the regular rate include reimbursement for expenses incurred on the employer's behalf, premium payments for overtime work and the premium portion that is not less than time and one-half the regular rate paid for work on Saturdays, Sundays, and holidays; discretionary bonuses, gifts and payments in the nature of gifts on special occasions; and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

The Regular Rate is a Rate Per Hour: The Act does not require employers to pay employees on an hourly rate basis. Their earnings may be determined on a piece-rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed on the basis of the hourly rate derived from such earnings. The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment (except the statutory exclusions) in any workweek by the total number of hours actually worked in the workweek. A few examples will illustrate the application of this principle in particular instances:

a. Hourly Rate Employees: If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate" For overtime hours the employees must be paid, in addition to the straight-time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked over 40 in the week. If, for example, the hourly rate is \$4.00 and one works 46 in a week, the employee would be entitled to receive \$196.00 (46 hours at \$4.00 and 6 at \$2.00) or stated another way, 40 hours times \$4.00 plus 6 hours times \$6.00 (time and one-half).

b. Hourly Rate and Bonus: If the employee in example (a) received in addition to the earnings at the hourly rate, a bonus of \$9.20, the regular rate of pay would be \$4.20 an hour (46 hours at \$4.00 equals \$184.00 plus the \$9.20 bonus, making a total of \$193.20; this total divided by 46 hours yields a rate of \$4.20). The employee would then be entitled to receive a total wage of \$205.80 for 46 hours (46 hours at \$4.20 plus 6 hours at \$2.10).

c. Pieceworker: When an employee is employed on a piece-rate basis (so much per piece, dozen, gross, etc.) the regular rate of pay is computed by adding together the total earnings for the workweek from piece rates and all other earnings (such as bonuses) and any sums paid for waiting time or other hours worked. This sum is then divided by the number of hours worked in that week to yield the piece worker's "regular rate" for that week. For the overtime work the piece worker is entitled to be paid, in addition to the total straight-time weekly earnings, one-half this regular rate for each hour over 40 in the workweek. Since the employee has already received straight-time compensation for all hours worked, only additional half-time pay is required. Thus, if the employee has worked 50 hours and has earned \$205.00 at piece rates for 46 hours of productive work and in addition has been paid at \$4.00 an hour for 4 hours of waiting time, the total compensation of \$221.00 must be divided by the total hours of work; 50, to arrive at the regular hourly rate of pay -- \$4.42. For the 10 hours of overtime the employee is entitled to additional compensation of \$22.10 (10 hours at \$2.21). For the week's work the employee is entitled to a total of \$243.10 (40 hours at \$4.42 plus 10 overtime hours at \$6.63).

d. Day Rates and Job Rates: An employee may be paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case the employee's regular rate is found by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked over 40 in the workweek.

Employee Paid on a Salary Basis: If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate. For example, if an employee is hired at a salary of \$164.00 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or \$4.685 an hour, when overtime is worked the employee is entitled to receive \$4.685 for each of the first 40 hours and \$7.03 (time and one-half) for each hour thereafter. If an employee is hired at a salary of \$164.00 for a 40 hour week, the regular rate is \$4.10 an hour.

Salary for Periods Other than a Workweek: Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary can be converted to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its equivalent weekly wage by multiplying by 24 and dividing by 52.

Fixed Salary for Fluctuating Hours: The regular rate of an employee whose hours of work fluctuate from week to week, who is paid a stipulated salary with the clear understanding that it constitutes straight time pay for all hours worked, whatever their number and whether few or many, will vary from week to week. The regular rate is obtained for each week by dividing the salary by the number of hours worked in the week. It cannot, of course, be less than the applicable minimum wage in any week. Since straight-time compensation has already been paid, the employee must receive additional overtime pay for each overtime hour worked in the week at not less than one-half this regular rate. Take the example of an employee who works no more than 50 hours and is compensated on a fluctuating workweek basis at a weekly salary of \$200.00. If during the course of four weeks the employee works 40, 44, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is \$5.00, \$4.55, \$4.00 and \$4.17. Since straight-time pay for all hours worked has already been paid, only additional half-time pay is due. For the first week the employee is due \$200.00; for the second week \$209.10 (\$200 plus 4 hours at \$2.275); for the third week \$220.00 (\$200 plus 10 hours at \$2.00); for the fourth week \$216.68 (\$200 plus 8 hours at \$2.085).

Employees Working at Two or More Rates: Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs.

Payments Other than Cash: Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or facilities must be included in the regular rate. Where, for example, an employer furnishes lodging to employees in addition to cash wages, the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

Commission Payments: Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount or on some other formula) are payments for hours worked and must be included in the regular rate. This is so regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a salary or hourly rate. It does not matter whether the commission earnings are computed daily, weekly, monthly or at some other interval.

Commission Paid on a Workweek Basis: When a commission is paid on a workweek basis, it is added to the employee's other earnings for that workweek, and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each overtime hour worked.

Deferred Commission Payments: If the calculation and payment of the commission cannot be completed until some time after the regular pay day for the workweek, the employer may disregard it until the amount of commission can be determined. When the commission can be computed and paid, the additional overtime compensation must be paid.

To compute this additional overtime compensation, the commission is apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime pay for each week during the period in which overtime was worked. If it is not possible or practicable to allocate the commission on the basis of the amount of commission actually earned each week, some other reasonable and equitable method must be adopted. One such method is to allocate an equal amount of commission earnings to each workweek in the period in which the commission was earned; another, is to allocate equal amounts to each hour worked in that period.

For the weekly basis:

(1) If the commission computation period is one month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week.

(2) Divide the commission for each week by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week.

For example, if there is a monthly commission payment of \$41.60, the amount of commission allocable to a single week is \$9.60 ($\41.60×12 equals \$499.20 divided by 52 equals \$9.60). In a week in which an employee works 48 hours, dividing \$9.60 by 48 gives an increase to the regular rate of 20 cents. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of 80 cents.

Overtime Based on Authorized Basic Rates: Regulations, Part 548, authorize the use of basic wage rates for the computation of overtime. "Basic rates" must be substantially equivalent to the average hourly earnings paid and may be used only pursuant to an agreement or understanding arrived at between the employer and the employees or as a result of collective bargaining before performance of the work. As an example, to simplify bookkeeping and computation of overtime, the regulations authorize rates obtained by dividing an employee's piece work earnings each day, and using that rate for computation of pay for overtime worked that day.

PAYMENTS EXCLUDED FROM THE REGULAR RATE

Overtime Pay for Hours in Excess of a Daily or Weekly Standard: Many employment contracts provide overtime pay for hours worked over 8 per day or 40 per week. Such extra compensation paid for the excess hours whether or not at time and one-half, is excludable from the regular rate and may be credited toward statutory overtime payments.

Premium Pay for Work on Saturdays, Sundays, and Other Special Days: Extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek as such, may be treated as overtime pay. If the premium rate is less than time and one-half, the extra compensation paid must be included in determining the regular rate of pay and cannot be credited toward statutory overtime due.

"Clock Pattern" Premium Pay: A collective bargaining agreement or other employment contract may in good faith establish certain hours of the day as the basic, normal or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) and provide for the payment of a premium for work outside such hours. The extra pay will be treated as an overtime premium if the premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the basic, normal or regular workday or workweek.

Non-Overtime Premium: Lump sum payments which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer gives 8 hours pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours pay received by an employee who completes the job in 6 hours must be included in the regular rate. Similarly, where an employer pays a flat sum such as \$20 for a job performed during the overtime hours regardless of the time spent on the job, no part of the premium paid qualifies as true overtime.

Bonuses: All remuneration for employment except the payments specified in the law are included in the regular rate. Among these excludable payments are discretionary bonuses and gifts and payments in the nature of gifts on special occasions. Nondiscretionary bonuses must be totaled in with other earnings to determine the regular rate on which overtime must be paid. Where the bonus covers only one weekly pay period, the amount is added to the employee's earnings and the total divided by the total hours worked. Where the bonus covers a longer period of time, the employer may temporarily disregard the bonus and pay for overtime at time and one-half exclusive of the bonus. When the amount of the bonus can be ascertained, it is apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive additional pay for each workweek that he or she worked overtime during the period. The overtime pay will be one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of overtime hours worked during the week.

Discretionary Bonuses: A bonus need not be included in the regular rate if the employer retains discretion both (1) that a bonus will be paid and (2) that the amount is not determined until the end, or near the end, of the bonus period. Thus, for example, if an employer paid a bonus without prior contract, promise, or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate. On the other hand, if an employer announces in January that a bonus will be paid in June, discretion regarding the fact of payment has been abandoned. Such a bonus would not be excluded from the regular rate under the Act.

Gifts, Christmas and Special Occasion Bonuses: If a bonus paid at Christmas or on other special occasions is a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it. It may be excluded even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate. For example, a Christmas bonus of two weeks salary to all employees and an equal additional amount for each 5 years of service with the firm would be excluded from the regular rate of pay. However, if the bonus is geared to hours worked or production, or is so substantial when compared with regular wages that the employees consider it a part of wages, it is not considered as a gift.

Reimbursement for Expenses: When an employee incurs expenses on the employer's behalf or where the employee is required to spend sums solely for the convenience of the employer, payments to cover such expenses are not included in the employee's regular rate of pay. Examples of such expenses are sums spent by the employee to buy supplies for the employer; travel expenses while traveling on the employer's business; and supper money where an employee works past the normal quitting time. Reimbursement for such expenses is not compensation for services rendered by the employees.

Pay for Certain Idle Hours: Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work (for example, because of machinery breakdown or materials shortage), or other similar causes, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for the hours of employment and may be excluded from the regular rate of pay. However, no part of such payments may be credited toward overtime compensation due under the Act.

Pay for Foregoing Holidays and Vacations: In some instances employees are entitled to holiday or vacation pay but forego the holiday or vacation and work on that day or period. If they receive their customary rate (or higher) for their work on the holiday or vacation day, the additional sum given as holiday or vacation pay is excluded from the regular rates of pay.

"Show-up" and "Call-Back" Pay: Some employment agreements provide for a stated number of hours pay if the employee is not provided with the expected amount of work. For example, an employee might be guaranteed all least 4 hours' pay for reporting for work, or if called back to work after the scheduled hours have been ended. If the employee works only 2 hours but is paid for 4 hours, the pay for the two hours not worked is not regarded as compensation for working time and may be excluded from the employee's regular rate of pay, but cannot be credited toward statutory overtime pay due.

"On-Call" Pay: If employees who are on-call are not confined to their homes or any particular place, but are required only to leave word where they may be reached, the hours spent on-call are not regarded as working time. However, any payment for such on-call time, while not attributable to any particular hours of work, is paid for performing a duty connected with the job and must be included in the employee's regular rate. If an on-call employee is called out for a job assignment, the time spent on the assignment is hours worked and must be counted and paid for. For example, an employee paid \$4.00 an hour works 40 hours and is paid \$22 for being on-call over the weekend. If called back for 4 hours of work, the pay is \$160.00 (40 hours x \$4.00) plus \$22 on-call pay plus \$16 straight-time pay for 4 overtime hours, or \$198.00. Dividing the total earnings of \$198.00 by 44 hours worked yields a regular rate of \$4.50 an hour. One-half the regular rate times 4 overtime hours equals \$9.00 overtime pay, making the total pay \$207.00 for the week.

Exclusion of Minor Additions to Pay in Cash or in Kind: Under Regulations Part 548, minor additions to pay in the form of cash or in kind, such as a single meal per day, may be excluded from the regular rate in computing overtime pay due. The value of the additional payment may not increase the total pay of the employee by more than 50 cents a week on the average for all overtime weeks in the period for which additional payments are made.

Profit-Sharing and Thrift or Saving Plans: Payments made by an employer on behalf of an employee to a bona fide profit-sharing plan or trust, or bona fide thrift or saving plan, which meet the requirements of regulations issued by the Administrator (Parts 547 and 549) may be excluded from the regular rate of pay. If the regulatory provisions are met, prior approval of the plan by the Department of Labor is not required.

Benefit Plans: Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits, such as Supplemental Unemployment Benefits, may be excluded from the regular rate of pay for purposes of computing overtime pay. Section 778.215 of Interpretative Bulletin, Part 778, sets forth the conditions for exclusion. If the conditions are satisfied, prior approval of the plan by the Department of Labor is not required.

OTHER MATTERS

How Deductions Affect the Regular Rate: Deductions made for such items as "board, lodging, or other facilities" furnished employees, union dues, savings bonds, and charitable contributions do not affect the regular rate. The employee's regular rate is computed before the deductions are made.

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of \$60 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees' straight-time rate is \$4.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at \$6.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire \$36.00 must be included in the employees' regular rate. The reason for this is clear. If the rule were otherwise, an employer desiring to pay a fixed salary regardless of the number of overtime hours worked could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The same reasoning applies to payment

of a flat sum for a special job performed during overtime hours. Extra compensation paid in the form of a lump sum for varying amounts of overtime hours must be included in the regular rate and may not be credited against statutory overtime compensation due.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge the statutory obligation. For example, an employee may be hired to work a 44-hour workweek for a weekly salary of \$200.00. In this instance the regular rate is obtained by dividing the \$200.00 straight-time salary by 44 hours, which results in a regular rate of pay 94.55. The employee is then due additional overtime computed by multiplying the 4 overtime hours by one-half the regular rate of pay (\$2.275) or \$9.10.

Overtime Pay May Not Be Waived: The requirement that overtime must be paid after 40 hours a week may not be waived by agreement between the employer and employees. Similarly, an agreement that only 8 hours a day or only 40 hours a week will be counted as working time will clearly fail. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for the overtime work.

Computing Overtime Pay on the Rate Applicable to the Type of Work Performed in Overtime Hours: A simpler method of computing overtime pay for employees paid piece rates or at a variety of hourly rates is provided in section 7(g)(1) and (2). The regular rate may be computed at a piece rate not less than one and one-half times the bona fide piece rate applicable to the same work when performed during non-overtime hours. In the case of an employee performing two or more kinds of work for which different hourly rates have been established, the regular rate may be computed at rates not less than one and one-half times the bona fide rate for the same work when performed during non-overtime hours. Under these methods, there must be an agreement or understanding with the employees before performance of the work. Also, extra overtime compensation must be properly paid on other forms of additional pay required to be included in computing the regular rate.

Special Overtime Provision for Hospital Employees: Under section 7(j) hospitals and residential care establishments may, pursuant to a prior agreement or understanding with its employees, utilize a fixed work period of fourteen consecutive days in lieu of the workweek for the purpose of computing overtime, if they pay time and one-half the regular rate for hours worked over eight in any workday or eighty in the fourteen-day period, whichever is the greater number of hours.

Special Overtime Provision for Fire Protection and Law Enforcement Employees: Instead of the standard 7-day workweek, work periods of 7 to 28 days may be used in computing overtime pay for fire protection and law enforcement employees employed by public agencies. This exception from the standard 40-hour week is explained in Regulations, Part 553.