

# Wage and Hour Compliance

## WHAT EMPLOYERS NEED TO KNOW

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### Getting started: What do Wage and Hour laws refer to?

- Generally includes Minimum Wage and Overtime requirements
- For public employers overtime compliance is the primary concern
- Overtime compliance issues generally fall into four categories:
  - Worker Classification
  - Compensation Practices
  - Hours Worked
  - Recordkeeping and Notices

### Getting started: Where do overtime requirements come from?

- Overtime requirements originate from federal and state statutes
  - Fair Labor Standards Act (FLSA) found in 29 U.S.C. § 201
  - Kentucky Wage and Hour Act found in KRS Chapter 337
  - No local wage and hour laws
- Overtime requirements include implementing administrative regulations
  - By the Department of Labor in 29 C.F.R. Chapter V
  - By the Kentucky Labor Cabinet in 803 KAR Chapter 1
- Overtime requirements also are subject to court review and precedent

### Getting started: Do federal and state overtime laws work together?

- Overtime requirements under federal and state law have some differences but are generally consistent
- When the laws conflict employers must follow whichever law is more favorable to employees
- More federal authority and guidance is available
  - More FLSA regulations are implemented
  - More FLSA court cases are filed
  - More informal FLSA guidance is published

## Worker Classification: The Basics

- Wage and hour overtime requirements do not apply to all workers
- There are two types of exceptions from overtime requirements
  - (1) If the worker is not an “employee” as defined by law (*i.e.*, is “not covered”)
  - (2) If the worker is an employee, but qualifies for an exemption (*i.e.*, is “exempt”)
- The process to evaluate whether workers are covered or exempt usually is referred to as “classification”

## Worker Classification: What workers are not defined as employees?

- Wage and Hour laws have an extremely open-ended definition of employment → “to suffer or permit to work”
- Most workers will qualify as employees under that definition
- The most common exception (for public and private employers) is for workers who are “independent contractors”

## Worker Classification: What workers are not defined as employees?

- A multi-factor “Economic Realities Test” is used by administrative agencies and courts to distinguish “independent contractors” from employees
- Some of the most important factors to consider under the “Economic Realities Test” include:
  - (1) How the worker is paid either through payroll or from profits or losses
  - (2) Who owns the equipment and tools that are used
  - (3) Who controls the method and mode of the work
  - (4) Whether the worker has other clients

## Worker Classification: What workers are not defined as employees?

Some special exceptions from the employee definition for public employers:

- Elected officials and their appointments for
  - Personal staff
  - Policymaking positions
  - Immediate advisors
- Employees of legislative bodies
- Volunteers

## Worker Classification: What employees are exempt?

- The three “white collar” exemptions are the most common:
  - (1) Executive
  - (2) Administrative
  - (3) Professional
- Many other special exemptions have been created but they are very limited in scope and most public employers cannot take advantage of them

## Worker Classification: What employees are exempt?

Two considerations generally apply when evaluating whether an employee qualifies for an exemption:

- (1) Is the employee paid on a “salary basis”?
- (2) Does the employee perform “primary duties” consistent with one or more exemption categories?

## Worker Classification: The Salary Basis requirement for all exemptions

- The minimum salary basis requirement is inapplicable to doctors, lawyers, teachers, and outside salespersons
- All other exempt employees must be paid a minimum salary set by regulation to qualify
- Federal regulatory amendments effective January 1, 2020 increased the exempt employee minimum salary to \$684 weekly (\$35,568 annually)
- Kentucky has not amended its regulations to increase the minimum salary, but public employers are subject to and must follow federal law that is more favorable to employees

## Worker Classification: The Salary Basis requirement for all exemptions

- An employee's salary cannot be reduced based on variations in the quantity or quality of work to qualify
- Reducing an employee's salary **generally** converts the employee to hourly status and forfeits any exemption
- Common exceptions when an exempt employee's salary can be reduced include:
  - Workweeks when no work was performed
  - Full workday absences for personal reasons, sickness, or disciplinary suspension
  - Full or partial workday FMLA absences

## Worker Classification: The Salary Basis requirement for all exemptions

Two other common salary basis issues –

- (1) Rules limiting employee salary reductions based on quantity or quality of work are directed to workweek-to-workweek fluctuations; salary adjustments can be made prospectively based on economic or other factors
- (2) Requiring exempt employees to track full and partial absences under paid leave policies is permissible, but enforcement must be careful not to result in workweek-to-workweek salary reductions

## Worker Classification: Some general Primary Duty rules

- Regulations detail the “primary duties” employees must perform to qualify for exemption
- Different exemptions and have different “primary duties”; however, primary duties under more than one exemption can be aggregated
- Employees generally must spend 51% of their work time performing the “primary duties” associated with an exemption or combination of exemptions

## Worker Classification: Executive Exemption Primary Duties

The Executive Exemption applies to an employee who:

- (1) Manages an enterprise or department;
- (2) Customarily and regularly directs the work of two or more employees and
- (3) Has the authority to hire/fire employees or whose suggestions regarding hiring/promotion are given weight

## Worker Classification: Executive Exemption Primary Duties

- Examples of qualifying “management” duties include: interviewing, selecting and training employees, setting rate of pay and hours, appraisal of employees, handling employee complaints and grievances, disciplining, apportioning work, budgeting, legal compliance and safety
- The two supervised employees must be full time or their equivalent
  - For example, one full time and two 20-hour part time workers
  - Supervising volunteers or unpaid interns does not count

## Worker Classification: Administrative Exemption Primary Duties

The Administrative Exemption applies to an employee who:

- (1) Performs work directly related to the management or general business operations of the employer; and
- (2) Exercises discretion and judgment with respect to matters of significance.

## Worker Classification: Administrative Exemption Primary Duties

- The employee's work must not relate to the employer's core mission
- Examples of work related to management or general business operations include: tax, finance, accounting, budgeting, auditing, insurance, purchasing, advertising, research, safety and health, personnel management, human resources, employee benefits, computer network, legal compliance

## Worker Classification: Professional Exemption Primary Duties

- There are different kinds of professional exemptions; the “learned” professional is the most common
- The learned professional exemption applies to positions requiring advanced knowledge, in a field of science or learning AND customarily is acquired by a prolonged course of specialized intellectual instruction

## Worker Classification: Professional Exemption Primary Duties

Common learned professional exemption errors –

- The exemption does not apply just because the employee hired for the position has an academic degree
- The exemption does not apply if experience can be substituted for an academic degree
- The exemption does not apply to positions requiring an academic degree in any field

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## Compensation Practices: The Basics

- For exempt employees the “salary basis” requirement applies
  - ❖ Minimum salary of \$684 weekly (\$35,568 annually) effective January 1, 2020 under federal law
  - ❖ The salary can be reduced only if special circumstances apply
- Non-exempt employees must be paid overtime equal to one and one-half their regular hourly rate of pay for all hours worked in excess of 40 per workweek

### Compensation Practices: The Regular Hourly Rate of Pay for OT

- Non-exempt employees are often referred to as “hourly”; however, they can be paid based on salary, commission, piece rates, etc.
- When the non-exempt works over 40 hours and is owed overtime the employee’s compensation must be converted into the rate per hour

### Compensation Practices: The Regular Hourly Rate of Pay for OT

- The non-exempt employee’s regular hourly rate of pay for overtime may include more than just “base pay”
  - Bonuses based on production or efficiency
  - Sick leave buy-backs
- If bonuses or buy-back are paid the employer must reallocate the compensation over the period earned and pay overtime if worked

## Compensation Practices: The Regular Hourly Rate of Pay for OT

Some items of compensation are not included when determining the non-exempt employee's regular hourly rate of pay for overtime –

- Sums paid as gifts or rewards
- Discretionary bonuses
- Paid leave when no work was performed
- Expense reimbursements
- Contributions to retirement or benefit plans

## Compensation Practices: Special "Comp Time" Option

- Public employers can substitute compensatory time off ("comp time") instead of paying overtime wages
- Mandatory Comp Time rules –
  - ❖ A written agreement is required
  - ❖ 1.5 hours of comp time must be earned for each hour of overtime worked
  - ❖ Maximum comp time accrual is 480 hours for non-exempt emergency personnel and 240 hours for all other non-exempt employees
  - ❖ Comp time cannot be forfeited, and must be cashed out if an employee has unused comp time after the employment ends
  - ❖ Recordkeeping requirements apply to track comp time accrual and redemption

## Compensation Practices: Special “Comp Time” Option

Some Comp Time tips –

- Inserting the comp time policy into an employment handbook with employee’s signed acknowledgement will satisfy the written agreement requirement
- To control comp time accrual employers can
  - ❖ Set lower maximum accruals by policy
  - ❖ Compel employees to use comp time at the discretion of the employer or in lieu of other paid leave, which should be reserved in the comp time policy
  - ❖ Cash out comp time or switch to paying overtime wages
  - ❖ Require employer approval before employees work overtime and accrue comp time, which should be included in the comp time policy

## Compensation Practices: Special “Comp Time” Option

How are employees allowed to use comp time –

- Employees must be allowed to use accrued time within a “reasonable period” after making a request
- This does not mean comp time has to be granted on specific dates and times requested by the employee
- However, request should be granted very near in time to the request to comply
- May deny request only if it would “unduly disrupt” office operations → this has to be more than “mere inconvenience”

## Hours Worked: The Basics

- Overtime (or comp time) is earned only when non-exempt employees **actually** work more than 40 hours in a single workweek
- One common employee misconception: Paid leave does not count as hours worked
- One common employer misconception: Work hours cannot be averaged across multiple workweeks to avoid overtime

## Hours Worked: Special Issues

### Rest Breaks:

- 10 minute rest periods are **required** every 4 hours
- Rest periods are treated as paid work time
- Employers can otherwise regulate breaks
  - Prohibit consecutive breaks
  - Prohibit employees from taking breaks together

## Hours Worked: Special Issues

### Meal Periods:

- Can be waived by “mutual agreement” between the employer and employee
- Unless otherwise agreed to, meal periods of approximately 30 minutes are required between 3 hours and 5 hours after the shift starts
- Employees must be “relieved from duty,” but the employer can require employees to
  - Remain on premises
  - Monitor radios if it does not regularly interfere
- Meals periods are not working time and can be unpaid

## Hours Worked: Special Issues

### Normal travel (i.e., “same day”) –

- Regular Home-Work commuting is not work time
- Commuting can be to fixed or varied jobsites
- Travel during the workday to multiple jobsites is paid work time
  - Referred to as the “continuous workday rule”
  - Be careful about when the “workday” starts → receiving instructions, picking up tools, etc.

## Hours Worked: Special Issues

Travel away from home (i.e., “overnight”) –

- Travel on regular workdays during regular work hours is paid work time
- Federal law wrinkle: Travel on non-regular workdays during regular work hours is paid work time, unless the employee travels by common carrier

## Hours Worked: Special Issues

Waiting Time:

- May be unpaid if the employee is relieved from duty with sufficient notice and amount of time to use it effectively for own purposes
- Waiting time is otherwise paid work time, even if the employee has downtime to read books or do crosswords

On-Call Time:

- Very fact specific
- Key factors tend to be whether call-in is frequent, restrictive, or can be traded

## Hours Worked: Special Issues

### Off-the-Clock Work:

- Employers must pay for work time whenever the “employer knows or has reason to believe” work was performed
- Workplace rules prohibiting overtime without supervisor approval is good but not enough
- Management has a duty to exercise control and cannot accept the benefits of work without paying for it
- Common off-the-clock work scenarios:
  - Working early before clocking in
  - Clocking out for lunch but working through it
  - Working late after clocking out
  - Working remotely from home

## Recordkeeping Requirements

### Required information for non-exempt employees:

- 1) Employees full name, employee number if any, and social security number
- 2) Employee’s home address including zip code
- 3) Employee’s birthdate, if younger than 18
- 4) Employee’s sex and occupation
- 5) Time and day of week when the employee’s workweek begins
- 6) Employee’s regular hourly pay rate including how the employee is compensated
- 7) Total hours worked each workday and each workweek by the employee
- 8) Employee’s total daily or weekly straight time earnings
- 9) Employee’s total overtime earning for the work week
- 10) All additions to or deductions from the employee’s wages
- 11) Total wages paid each pay period to the employee
- 12) Date of payment and pay period covered by payment

\* For exempt employees only items 1 – 5 and 11 – 12 are required.

\*\* Retention requirements vary from 1 to 3 years.

## Recordkeeping Requirements

- No special method is required to track hours worked
  - Using timeclocks or timesheets are common
  - Standard work hours also can be used if the employer has a procedure for employees to note changes
- Rounding to the nearest quarter-hour is permissible
  - The rounding should “even out”

## Posting Requirements

- State and Federal law both have workplace posting requirements
- Free posters are available online

## Wage and Hour Non-Compliance: What are the consequences?

- Wage and Hour violations can be enforced in two ways:
  - (1) Employees can file private lawsuits
  - (2) Agencies can open administrative actions
- Under federal law supervisors can be sued individually in addition to the employer
- Damages can include back pay, liquidated “double” damages, and attorney fees and costs