



## 8 MYTHS ABOUT OVERTIME

The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees (commonly referred to as “hourly” employees) an overtime premium if they work more than 40 hours in a workweek. The overtime premium must be at least 1.5 times the employee’s regular rate of pay.

Some employers have certain misconceptions about overtime and exemptions. Below are some of the most common myths along with an overview of the FLSA’s requirements:

### MYTHS ABOUT OVERTIME:

#### **MYTH: “UNAUTHORIZED” OVERTIME NEED NOT BE PAID.**

**Fact:** If a non-exempt employee has worked overtime, he or she must be paid an overtime premium, regardless of whether the overtime was pre-authorized. The fact that an employer has a policy that no overtime work is permitted unless authorized in advance doesn’t relieve the employer of this requirement. The employer, however, may subject the employee to disciplinary measures for working unauthorized overtime, but in no case may the employer withhold overtime pay.

#### **MYTH: AN EMPLOYER MAY OFFER EMPLOYEES “COMP TIME” IN LIEU OF OVERTIME PAY.**

**Fact:** Compensatory time off (“comp time”) is paid time off that is offered to public sector employees instead of cash payment for working overtime hours. Comp time is not permissible in the private sector, so private employers may not offer compensatory time off in lieu of overtime pay.

#### **MYTH: AN EMPLOYEE’S HOURS MAY BE AVERAGED OVER TWO WORKWEEKS WHEN DETERMINING WHETHER OVERTIME IS DUE.**

**Fact:** The FLSA requires a single workweek to be used when determining if an employee is due overtime, irrespective of the employer’s pay cycle. For instance, if you have a bi-weekly pay schedule and an hourly employee works only 30 hours in one week, but 50 in the second week (a total of 80 hours over the two workweeks), that employees’ hours cannot be combined and “averaged” to avoid overtime payment. In this case, the employee would be entitled to 10 hours of overtime pay (all hours worked over 40 in that second workweek).

#### **MYTH: AN EMPLOYER MAY EXCLUDE REST PERIODS WHEN DETERMINING WHETHER THE EMPLOYEE HAS WORKED MORE THAN 40 HOURS IN A WORKWEEK.**

**Fact:** Rest breaks are considered hours worked and therefore must be paid and included when determining overtime. The Department of Labor (DOL) defines a rest break as any period lasting 20 minutes or less that the employee is allowed to spend away from work. Bona fide meal periods, on the other hand, aren’t considered hours worked and need not be included when determining whether an employee is due overtime as long as the meal period is at least 30 minutes and the employee is *fully* relieved of all duties for the purpose of eating a regular meal.

## **MYTH: AN EMPLOYER MAY EXCLUDE TIME SPENT TRAVELLING WHEN DETERMINING WHETHER THE EMPLOYEE HAS WORKED MORE THAN 40 HOURS IN A WORKWEEK.**

**Fact:** Under the FLSA, travel that keeps an employee away from home overnight is considered hours worked when it takes place during the employee's regularly scheduled work hours, regardless of which day of the week the travel occurs. In addition, travel time for special one day assignments, certain emergency calls, and travel from job site to job site throughout the work day is compensable. This means that the time must be included when determining whether overtime is due.

**Example:** A non-exempt employee's regular work hours are 8 a.m. to 5 p.m., Monday through Friday. The employee goes on a business trip that begins with a 9 a.m. flight on a Saturday. The flight takes 3 hours. Even though the travel does not occur on the employee's normally scheduled work day, the entire flight must be considered work time since it cuts across the employee's normal work hours. This time, therefore, must be taken into account when determining whether overtime is due.

## **MYTH: IF AN EMPLOYER PAYS AN EMPLOYEE A SALARY, THE EMPLOYEE IS AUTOMATICALLY EXEMPT FROM OVERTIME.**

**Fact:** There is often confusion about the differences between a *salaried* and an *exempt* employee because the terms are sometimes used interchangeably. Employers have the option of paying non-exempt employees on a salary basis. However, simply because an employee is paid on a salary basis does not mean the employee is exempt from overtime; the employee must meet very specific criteria in order to be considered exempt. These exemptions are narrowly defined and are based on an established set of criteria relating to the employee's salary *and* duties.

**Note:** The Department of Labor is expected to propose new overtime exemption tests in late June 2015. The anticipated changes include an increased salary requirement and revisions to the duties tests. Watch for continued developments in this area.

## **MYTH: MY EMPLOYEES ARE TECHNICALLY NON-EXEMPT BUT THEY HAVE ASKED ME TO CLASSIFY THEM AS EXEMPT FROM OVERTIME. SINCE THEY ARE WILLING TO WAIVE THEIR RIGHT TO OVERTIME; IS IT OK FOR ME TO CLASSIFY THEM AS EXEMPT?**

**Fact:** Employees may not waive their right to overtime. If they don't satisfy the tests for exemption, they must be classified as non-exempt and paid overtime whenever they work more than 40 hours in a workweek

## **MYTH: IF AN EMPLOYEE IS CLASSIFIED AS EXEMPT FROM OVERTIME UNDER THE FLSA, THE EMPLOYEE IS ALSO EXEMPT UNDER STATE LAW.**

**Fact:** State laws may have additional requirements for exemption. If an employee is non-exempt under *either* federal or state law, the employee must be classified as non-exempt and receive overtime pay in accordance with that law.

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