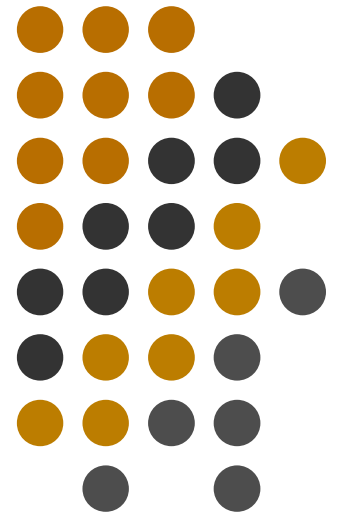




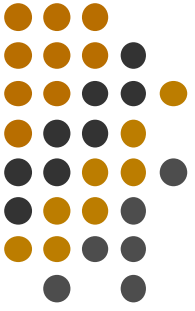
RAINEY • KIZER • REVIERE & BELL PLC

Ten FLSA Pitfalls to Avoid

Presented by
Geoffrey Lindley & Matthew Courtner

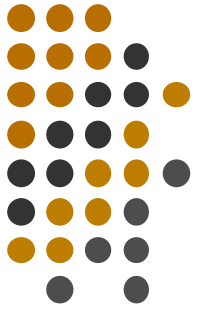


Number 1



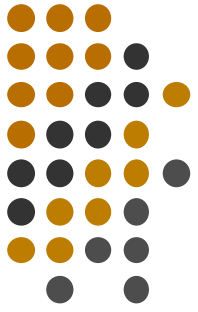
On-Call Work

On-Call Work



- Pitfall to Avoid:
- Improperly paying employees for on-call work.
- Is the employee engaged to wait or waiting to be engaged?

On-Call Work



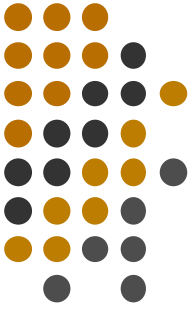
- If an employee is engaged to wait, it is compensable time.
- Employee who remains “on-call” while on employer’s premises is working.
- Example – a fireman plays chess while waiting for a fire call is engaged to wait and is working during this period of inactivity.

On-Call Work



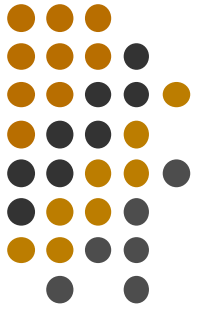
- If employee is waiting to be engaged, it is generally not compensable time.
- An employee who is “on call” at home and is free to do anything he/she wishes is not working.
- Employee begins working when receives call and must respond.

Number 2



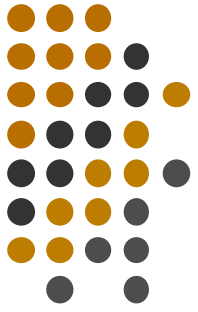
After Hours Work

After Hours Work



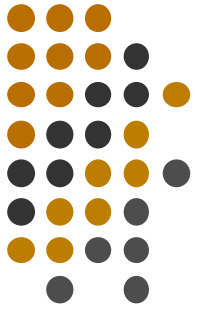
- With our growing dependence on technology, after hours work is easier to do than ever before.
- Examples:
 - Email on phones
 - Phone calls and text messages

After Hours Work

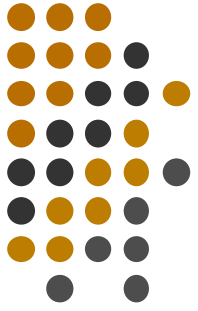


- Pitfall to Avoid:
- Not paying non-exempt employees for after hours work.
- Non-exempt employees must be compensated for all hours worked, including after hours work.

After Hours Work



- Employers thus should limit non-exempt employees' ability to work away from the office (e.g., at home).
- Employers need a policy that requires non-exempt employees to report after hours work to be paid for it.

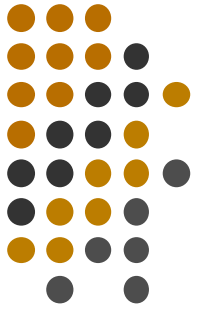


After Hours Work

- Employers should instruct supervisors/managers not to contact non-exempt employees after regular work hours.



Number 3

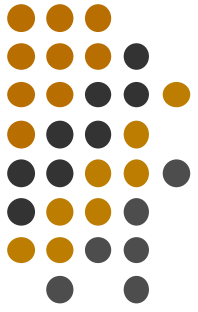


Rest & Meal Breaks

Rest & Meal Breaks

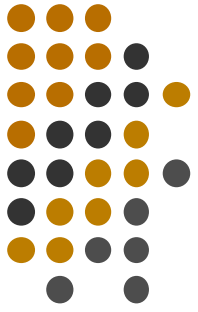


- Pitfall to Avoid:
- For meal breaks, an employer must ensure that the employee is completely relieved of any work during the break.



Rest & Meal Breaks

- Tennessee law—not the FLSA—creates required rest and meal breaks.
- Under TN law, employer must generally provide a 30-minute unpaid meal break if employee is scheduled to work more than 6 consecutive hours.



Rest & Meal Breaks

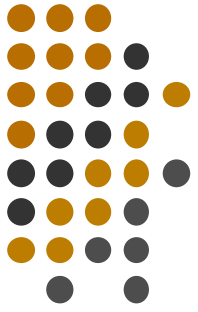
- When meal break is unpaid, employees cannot perform any work while on break.
- The employee must be completely relieved of duty for the purpose of eating regular meals.
- The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.



Rest & Meal Breaks

- It is easy to have a class of employees who claim that they were not paid for a meal break or rest break but were required to perform tasks for the employer, such as answer phone calls or respond to emails.

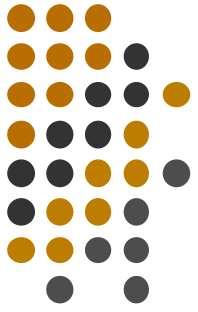




Rest & Meal Breaks

- Pitfall to Avoid:
- Unpaid rest periods.
- Under the FLSA, rest periods of short duration, normally 20 minutes or less, must be paid as working time.

Rest & Meal Breaks



- Short rest periods are viewed as common in industry and thus must be counted as hours worked.
- Consequently, if an employee takes a break of 20 minutes or less, then the employer must pay the employee for the break.

Number 4



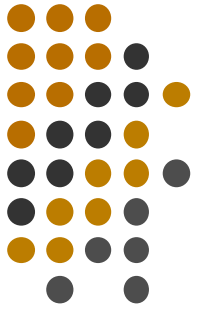
Travel Time

Travel Time



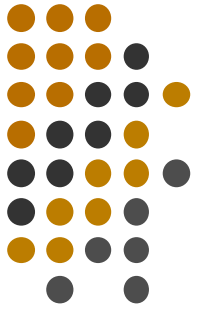
- Pitfall to Avoid:
- Not appropriately paying employees travel time.
- Determining when travel time is compensable depends on the kind of travel involved.

Travel Time



- Home to Work Travel
 - Ordinary home to work travel is not compensable work time
 - An employee who travels from home to work before the regular workday and who returns to his/her home at end of the workday is engaged in ordinary home to work travel.

Travel Time



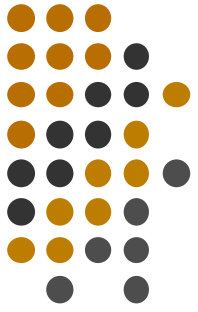
- Home to Work Travel
 - If the employee is required to stop somewhere on the way to the job site, such as to pick up tools or received instructions, travel time from that place to the job site is compensable.
 - Similarly, if the employee is required to perform work while traveling, the travel time is compensable.

Travel Time



- Travel on a Special Assignment
 - An employee who regularly travels from home to a fixed job site is under the rule for ordinary home to work travel that is not compensable.
 - When that employee, however, must travel for a special assignment to another city, the time spent traveling to and returning from the other city is work time, except that the employer may deduct/not count the time that the employee would normally spend traveling to his/her regular job site.

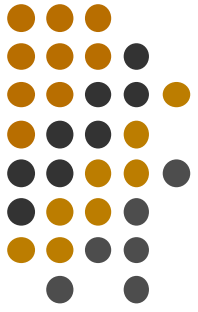
Travel Time



- Travel on a Special Assignment
 - Alice lives in Henderson, but works in Jackson. She normally drives 30 minutes to work. One day she has to work in Nashville. It takes Alice two hours and twenty minutes each way to Nashville.
 - What travel time must Alice's employer pay her for?

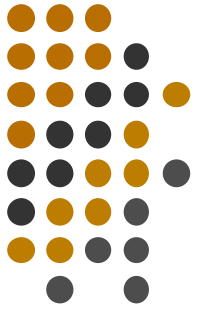


Travel Time



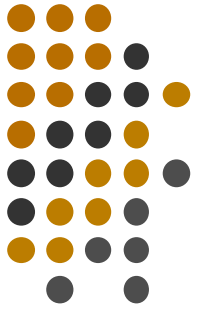
- Travel during a Normal Day
 - When an employee must travel during his/her normal work day, the travel is work time and is compensable.
 - The time an employee spends traveling from one job site to another job site is compensable travel time.

Travel Time



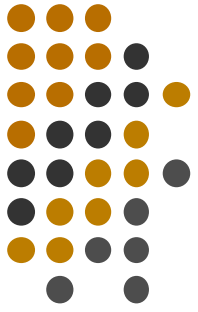
- Travel Away from Home
 - Travel that causes any employee to be away from home overnight is compensable when it occurs during the employee's normal hours worked, including non-working days.
 - Travel time outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not compensable, unless the employee is performing work during that time.

Travel Time



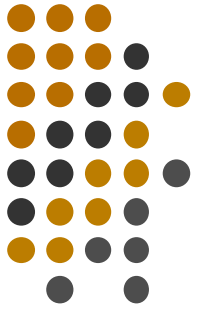
- Travel Away from Home
 - Alice normally works Monday through Friday 8:00 a.m. to 5:00 p.m. She is required to travel by plane to a conference. She leaves her home at 2:00 p.m. on Sunday and arrives at her destination at 9:00 p.m. Her plane departs at 4:00 and arrives at 6:30. During her plane ride, Alice reviews various financial reports.
 - What time is compensable?
 - What time is non-compensable?

Number 5



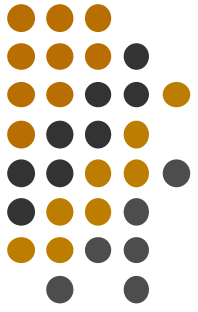
Comp Time Programs

Comp Time



- Comp time is a program in which paid time off is given to an employee in lieu of overtime wages.
- Comp time is given at rate of 1.5 hours per 1 hour of overtime.

Comp Time

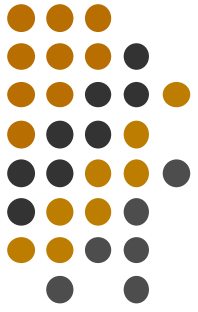


- Pitfall to Avoid:
- Private employers **cannot** provide a comp time program for non-exempt employees in lieu of wages.
- FLSA only permits comp time programs for public employers.

Number 6



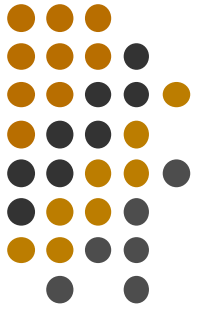
Documentation & Recordkeeping



Recordkeeping

- Pitfall to Avoid:
- Not having appropriate documentation to help defend an FLSA lawsuit in court or satisfy a DOL audit.

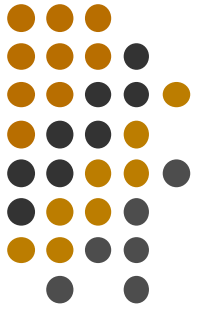




Recordkeeping

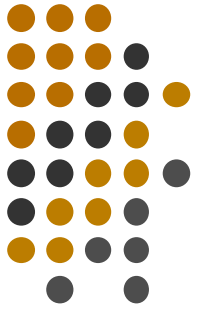
- DOL requires that employers retain the following information:
 - Employee name, SSN, address, birthdate (if under 19), sex, and occupation;
 - Time and day of week employee's workweek begins;
 - Hours employee worked each day;
 - Total hours worked each workweek;
 - Basis upon which employee is paid (e.g., \$9 per hour or \$500 per week);

Recordkeeping



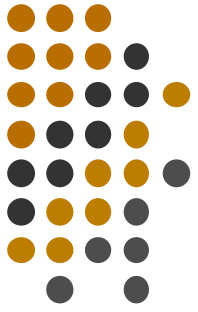
- DOL requires that employers retain the following information (cont.):
 - Regular hourly rate of pay;
 - Total daily or weekly straight-time earnings;
 - Total overtime earnings for the workweek;
 - All additions to or deductions from employee's wages;
 - Total wages paid each pay period; and
 - Date of payment and pay period covered by payment.

Recordkeeping



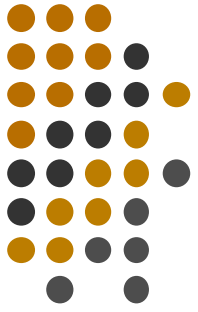
- How long must employers retain records?
 - Employer shall retain payroll records, collective bargaining agreements, and sales and purchase records for at least 3 years.
 - Employers shall retain records upon which wage computations are based—such as time cards, wage rate tables, work and time schedules, and records of additions to or deductions from wages—for at least two years. But we recommend three years.

Recordkeeping



- DOL does not prescribe specific method for employers to use in tracking and computing wages.
- Employer may use any timekeeping method they choose, such as using a time clock or a written record.

Number 7



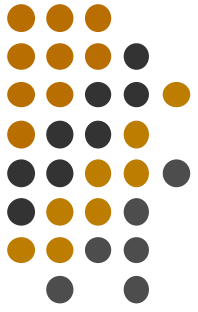
White Collar Exemptions

White Collar Exemptions

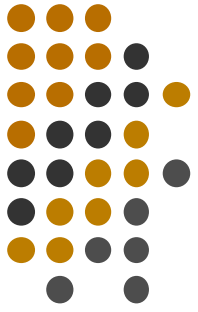


- Pitfall to Avoid:
- Employee misclassification
- Employers must ensure that an employee meets all 3 requirements for the FLSA's so-called white collar exemptions.

White Collar Exemptions



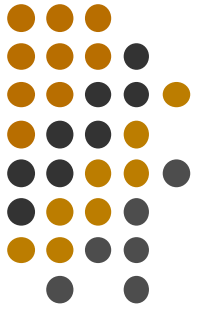
- FLSA's white-collar exemption is more than just meeting an earnings threshold of \$684 per week.
- Some employers think an employee is exempt if he/she earns at least \$684 a week and performs some administrative type tasks.
- Employers must ensure that its employees meet the salary level, salary basis, and job duties test.



White Collar Exemptions

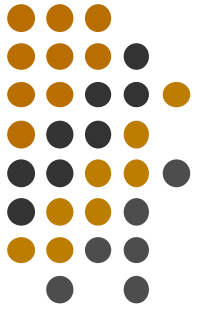
- Employee must meet 3 requirements:
 - (1) **Salary Level Test** - Amount of salary meets minimum amount
 - (2) **Salary Basis Test** - Employee paid predetermined and fixed salary regardless of amount of time worked; and
 - (3) **Job Duties Test** - Employee's job duties must fit into a specific exemption.

Job Duties Tests



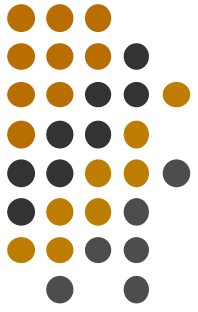
- Employers must ensure that the employees meet one of the following job duties tests:
 - Executive exemption;
 - Administrative exemption;
 - Learned professional exemption;
 - Creative professional exemption;
 - Computer employee exemption;
 - Outside sales exemption; or
 - Highly compensated employee exemption.

Executive Exemption



- Executive Exemption:
 - Employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
 - Employee must customarily and regularly direct the work of at least two or more full-time employees or their equivalent; and
 - 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.

Administrative Exemption



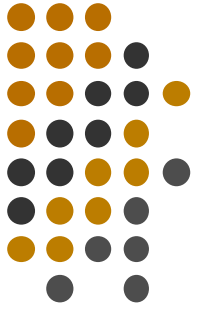
- Administrative Exemption:
 - Employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
 - Employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional



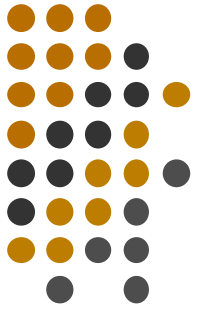
- Learned Professional Exemption:
 - Employee's primary duty must be the performance of work requiring advanced knowledge defined as work that is predominately intellectual in character and includes work requiring the consistent exercise of discretion and judgment;
 - The advanced knowledge must be in a field of science or learning; and
 - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional



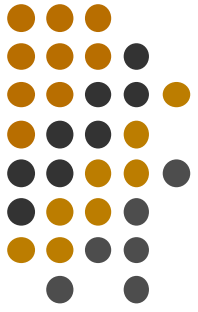
- Creative Professional Exemption:
 - Employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Computer Employee



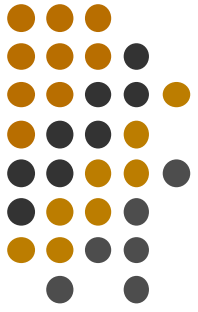
- Computer Employee Exemption:
 - Employee must be employed as a computer system analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field performing the duties described below.
 - Employee's primary duty must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;

Computer Employee



- Computer Employee Exemption:
 - Employee's primary duty must consist of (con't):
 - 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;
 - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skill.

Outside Sales



- Outside Sales Exemption:
 - Employee's primary duty must be making sales (as defined by 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
 - Employee must be customarily and regularly engaged away from the employer's place or places of business.



Highly Compensated Employee

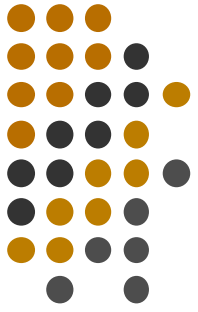
- Employee earns a total annual compensation of \$107,432 or more, which includes at least \$684 per week paid on a salary or fee basis;
- Employee's primary duty includes performing office or non-manual work; and
- Employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or [learned] professional employee.

White Collar Exemptions



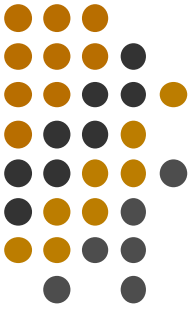
- Additionally, Employer must ensure that employees are truly paid on a “salary” basis by regularly receiving a predetermined amount of compensation each pay period on a weekly basis.
- Employee must receive this full salary for any week in which the employee performs any work, regardless of how many hours or days worked.

White Collar Exemptions

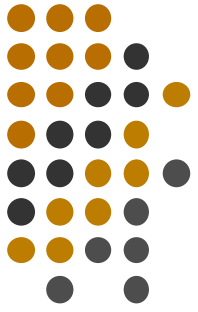


- Taking a deduction from an employee's predetermined compensation means that the employee does not meet the "salary basis" requirement.
- Employer is not required to pay the employee this predetermined salary for any workweek in which the employee performs no work.

Number 8



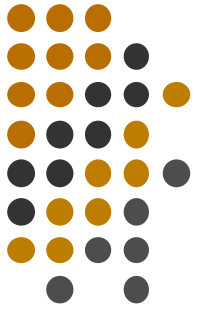
Non-Exempt Salaries



Non-Exempt Salaries

- Pitfall to Avoid:
- Not paying overtime to non-exempt employees who are paid a salary whether based on a fixed or a fluctuating workweek.
- Employers who pay non-exempt employees a salary must remember to pay the employee overtime for any hours worked over 40 hours.

Non-Exempt Salaries



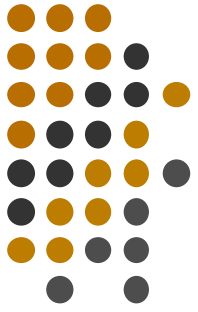
- Employer can elect to pay a non-exempt employee a salary—a set amount of compensation for up to 40 hours of work.
- However, if the employee works more than 40 hours, the employer must pay overtime at the rate of 1.5 times the base regular hourly rate.

Fluctuating Workweek



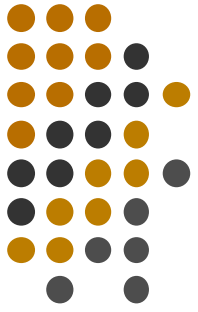
- Alternative to regular FLSA method of paying the base rate plus 1.5x base rate when an employee works overtime.
- Employee gets a fixed salary.
- Fixed salary is divided by actual hours worked for base rate.
- Employee receives additional 0.5 times base rate for hours worked over 40 per week to cover OT.

Fluctuating Workweek - Example

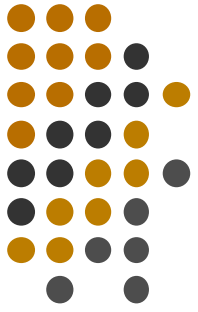


- Alex works at Acme Auto Parts as a cashier and delivery driver. Acme pays Alex \$500 a week for his work. Alex usually works between 32 and 40 hours per week. However, this past week, when a co-worker was out, Alex worked 50 hours.
- Acme must pay Alex overtime for these 10 hours.

Fluctuating Workweek – Example (cont.)



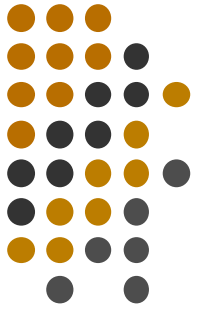
- Calculation:
 - Rate of pay - $\$500/50 \text{ hours} = \10.00
 - $\$10.00 \times .5 = \5.00 half-time rate
 - $\$5.00 \times 10 \text{ overtime hours} = \50.00 overtime due
 - Alex's total weekly pay - $\$500 + \$50.00 = \$550.00$



Fluctuating Workweek

Pros:

- Employee gets fixed pay, even when working less than 40 hours.
- Employee can budget better on fixed pay.
- Employers may reduce labor costs with a more steady payroll based on fixed pay.
- Fixed pay may promote employee loyalty.



Fluctuating Workweek

Usually works best for:

- Well-paid, formerly exempt employees interested in keeping a fixed salary.
 - White collar
 - High-pay blue collar
 - Some gray collar paraprofessional workers
- Workers in seasonal jobs, where workload is cyclical.

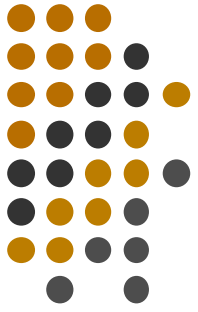


Fluctuating Workweek

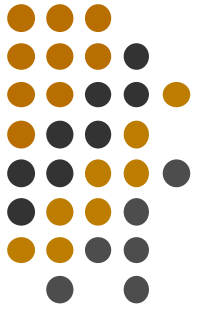
Cons:

- Additional compliance needed.
- Fixed pay owed even if fewer than 40 hours worked.
- Need a clear mutual understanding on how employees are being paid.
- Concerns for multi-state employers.
 - Some states do not allow this method.
 - Some states are undecided on this method.
 - Uncertainty if method is challenged.

Weekly Salary



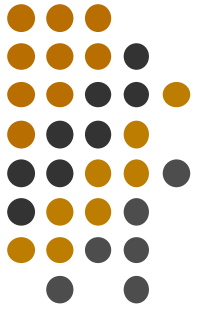
- If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate.



Weekly Salary

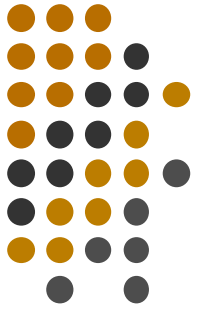
- If an employee is hired at a salary of \$350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is \$350 divided by 35 hours, or \$10 an hour, and when the employee works overtime the employee is entitled to receive \$10 for each of the first 40 hours and \$15 (one and one-half times \$10) for each hour thereafter. If an employee is hired at a salary of \$375 for a 40-hour week the regular rate is \$9.38 an hour.

Number 9



Deductions from Exempt
Employee Pay

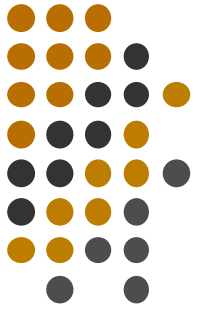
Exempt Employee Deductions



- Pitfall to Avoid:
- Improper deductions from an exempt employee's salary that destroy the exemption.

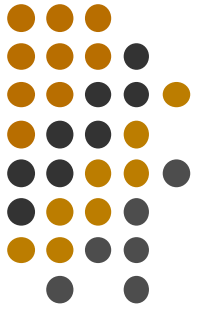


Pay Deductions



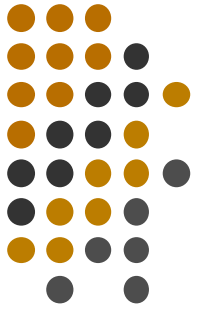
General Rule from salary basis requirement:

- If exempt employee performs any work during workweek, he/she must be paid full salary.
- Don't have to pay exempt employees for any workweek where they perform no work.



Pay Deductions Allowed

- Initial week of employment
- Final week of employment
 - Can deduct or reduce on a pro rata basis to reflect hours actually worked.
- Unpaid FMLA Leave
 - Can reduce salary based on amount of unpaid FMLA leave time absent.



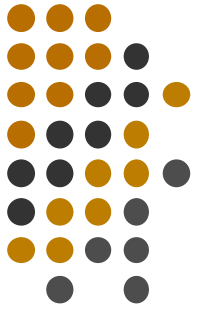
Pay Deductions Allowed

- Personal Absences
 - If absent for personal, non-sickness and non-disability reasons for 1 or more full days.
 - Can deduct in full-day increments for days missed.
 - Cannot reduce for partial days missed.



Pay Deductions Allowed

- Sick Leave/Disability Leave
- If employer has bona fide sick or disability leave plan, policy, or practice, can reduce for full-day absences if:
 - Not yet eligible for plan or
 - All leave under plan is exhausted
- If a plan or law provides wage replacement benefits, then can deduct 1 or more full days.



Pay Deductions Allowed

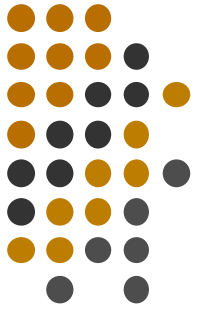
- Bona fide plan means:
 - Communicated to eligible employees;
 - Operates as described in plan;
 - Administered impartially;
 - Design does not reflect an intent to evade the requirement to pay a salary; and
 - Reasonable number of allowances provided.



Pay Deductions Allowed

- Jury Duty and Witness Attendance
 - Cannot reduce salary.
 - Can use jury/witness fees paid to employee to offset salary.
- Temporary Military Leave
 - Cannot reduce salary.
 - Can use military pay paid to employee to offset salary.

Pay Deductions Allowed

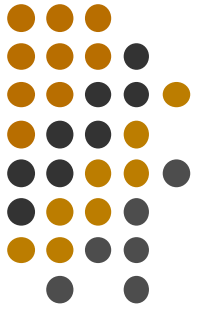


- Safety Rule Violations
 - Can impose salary deduction as penalty for violating safety rule.
 - Deduction can be equal to a partial day's wages.



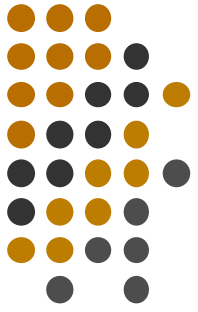
Pay Deductions Allowed

- Suspension without Pay
 - If suspension as part of disciplinary policy, may reduce salary based on full days suspended.
 - Must be written policy applicable to all employees.
 - Must deal with workplace misconduct.
 - Not attendance, job performance issues
 - Reduction only in full-day increments.



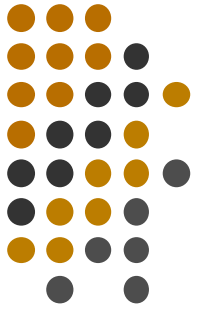
Improper Deductions

- Office closed because of inclement weather.
- Partial day absence to attend a parent-teacher conference.
- Absence for minor illness when employer does not have a bona fide sick leave plan, policy, or practice of providing wage replacement benefits.



Improper Deductions

- Lost or Damaged Equipment
 - Cannot deduct for loss/damage to employer-owned equipment.
 - E.g., laptops, cellphones issued to employees
 - Cannot impose as salary deductions.
 - Cannot impose as out-of-pocket reimbursements.
 - Cannot enforce under signed “agreements.”



Improper Deductions

- Lost Time
 - Can require exempt employees to work specified number of hours/week.
 - May require make up for personal absences less than 1 day's time.
BUT
 - Cannot dock salary for
 - Failure to work hours or
 - Failure to make up time missed.

Impact of Improper Deductions



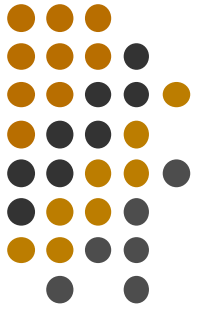
- Isolated or inadvertent improper deduction will not lose exemption.
- If DOL finds actual practice of improper deductions employer may lose exemption
 - Covering all employees in specific job classification
 - Covering period when deductions were made

Number 10



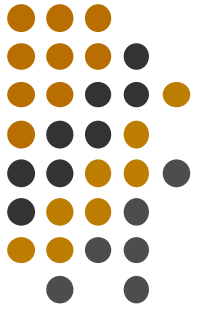
Bonuses for Non-Exempt
Employees

Non-Exempt Bonuses



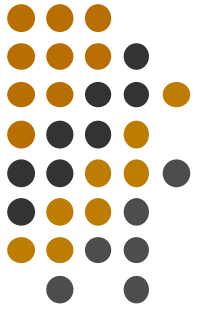
- Pitfall to Avoid:
- Improper classification of bonuses.
- If a bonus is paid improperly, the employee may not receive appropriate overtime pay.

Non-Exempt Bonuses



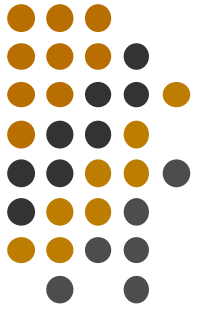
- A bonus is a payment made to an employee in addition to regular wages.
- Unless excluded from regular rate of pay under the FLSA, the bonus is included in the employee's regular rate of pay.

Non-Exempt Bonuses

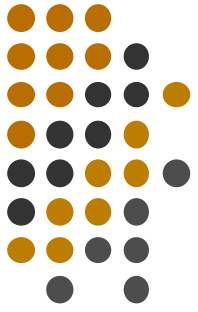


- **Discretionary bonuses** are excludable from regular rate of pay and, thus, do not affect overtime calculation.
- **Non-Discretionary bonuses** are generally included in the regular rate of pay.

Non-Exempt Bonuses



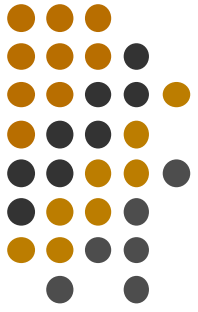
- To be discretionary, a bonus must meet 3 requirements:
 1. Employer must have sole discretion to determine whether to pay bonus.
 2. Employer must have sole discretion to determine the amount of the bonus.
 3. The bonus payment is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.



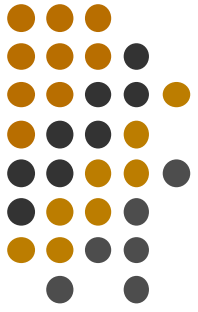
Non-Exempt Bonuses

- Examples of Discretionary Bonuses:
 - Bonus for persevering through a challenging or stressful situation;
 - Bonus to employees who made unique or extraordinary efforts not awarded according to pre-established criteria;
 - Employee-of-the-month bonus;
 - Severance bonus; or
 - Christmas bonus.

Non-Exempt Bonuses

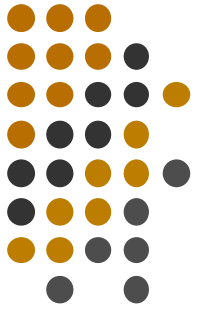


- Non-discretionary bonus is a bonus that fails to meet the statutory requirements of a discretionary bonus.
- These are non-discretionary because the employees know about and expect the bonus.



Non-Exempt Bonuses

- Examples of non-discretionary bonuses:
 - Bonuses based on a predetermined formula, such a production bonus;
 - Bonus for quality and accuracy of work;
 - Bonus to induce employees to work more efficiently;
 - Attendance bonuses; or
 - Safety bonuses.



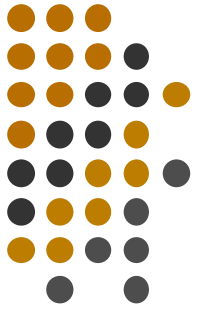
Non-Exempt Bonuses

- Nondiscretionary Bonus Example

Adam is paid \$12.00 per hour and he receives a \$100 bonus one week for exceeding his monthly production goal. Adam worked 45 hours that week. Here is how his overtime is calculated:

- $\$12.00 \text{ per hour} \times 45 \text{ hours} = \540.00 (total for straight time)
- $\$540.00 \text{ plus } \$100.00 \text{ bonus} = \$640$ total straight time compensation for week

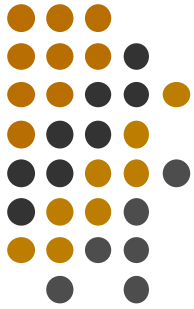
Non-Exempt Bonuses



- Nondiscretionary Bonus Example (cont.)
 - $\$640.00 / 45 \text{ hours} = \14.22 regular rate
 - $14.22 \times .5 = \$7.11$ half time premium pay rate
 - $\$7.11 \times 5 \text{ overtime hours} = \35.55 overtime pay due
 - $\$640.00 + \$35.55 = \$675.55$ total compensation



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