School of Government Advanced FLSA Workshop
Greenville
January 18-19, 2017

PAYING EMPLOYEES ON SALARY BASIS

Paying employees on a salary basis does not make them exempt employees. To pay an employee on a salary basis means no more than that the employee receives the same wages from pay period to pay period and that there are no changes to that amount based on variations in quality or quantity of work.

A. Exempt employees must be paid on a salary basis.

B. Nonexempt employees may be paid on a salary basis, but their hours must still be recorded and the employer must still pay them overtime once a nonexempt employee has physically worked more than 40 hours in a given workweek.

EXEMPT EMPLOYEES

A. They are paid on a salary basis; **and**

B. they earn at least **$455 per week** [***before December 1, 2016***] or **$913 per week** [***after December 1, 2016***] (the "salary threshold test"), **and**

C. they are executive, administrative or professional employees within the meaning of those terms as set forth in United States Department of Labor regulations -- in other words, they meet one of the following "duties tests:"

1. Duties Test for Executive Employees:

The position must

a. regularly direct the work of at least two employees, and

b. have a primary duty of management, and

c. have hiring, firing or promotion authority, or recommendations about hiring, firing and promotions are given particular weight.

2. Duties Test for Administrative Employees:

The position must

a. have a primary duty of office or nonmanual work directly related to management or general business operations of the employer, and

b. perform work requiring the exercise of discretion and independent judgment on matters of significance.

3. Duties Test for Academic Administrative Employees:

The position must

a. have a primary duty of performing administrative functions directly related to academic instruction -- the administrative work must be more than just "office or non-manual work."

b. No requirement that the person holding the position exercise discretion and independent judgment.

4. Duties Tests for Professional Employees:

Learned Professional Employees:

The position must

a. perform work requiring advanced knowledge in a field of science or learning;
For example, law, medicine, teaching, accounting, actuarial science, engineering, architecture, pharmacy and physical, chemical and biological sciences.

This advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

b. be intellectual in character;

c. require the consistent exercise of discretion and independent judgment.

Professional Exemption for Teachers:

The position must

a. have a primary duty of "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge;" and

b. be in a public school, community college, 4-yr. college or university.

c. The salary basis and salary threshold tests do not apply.

d. No requirement of discretion and independent judgment.

Professional Computer Employee:

The work must focus on:

a. the application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications (this may include consulting with users); or

b. the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, either based on and related to user or system design specifications, or related to machine operating systems; or

c. a combination of the two.

5. Combination Exemptions
29 CFR § 541.708:

> Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

DEDUCTIONS FROM WAGES

A. Deductions from the Salaries of Exempt Employees

There are many deductions from the salary of an exempt employee that a public employer may make that will not destroy the position's exemption:

1. **Disciplinary Suspensions without Pay**
   Allowed for a violation of safety rule of major significance, that is, a rule intended to prevent serious danger *to the workplace or other employees*. *The exemption does not cover violation of safety rules designed to prevent danger to the general public.* The deduction may be made in any amount and need not be tied to the employee's wage rate. **See 29 CFR §§ 541.602(b)(4) and 541.602(c).**

   Compare this rule with the rule on deductions from the pay of nonexempt employees, which is allowed for any disciplinary reason permitted by personnel policy. For example, a nonexempt employee may be suspended without pay for working overtime without authorization.

2. **Deduction for Full-Day Disciplinary Suspensions for Exempt Employees**
   Permitted only if:

   a. the suspension is for a violation of workplace conduct rules;
      The US Department of Labor gives violations of an employer's sexual harassment policy and violation of its workplace violence policy as examples and advises that tardiness, insubordination, performance failures do not fall within this exception.

   b. the employer has a written policy to that effect;

   c. the policy must be uniformly applied; **and**

   d. the deduction is for the pro-rata amount of weekly salary. **See 29 CFR § 541.602(b)(5).**

3. **Deductions for Absences in Excess of Accrued Sick or Vacation Leave**
   Docking the salary of exempt employees for absences in excess of accrued leave is permitted when

   a. the employer allows employees to accrue sick and vacation time; and

   b. the employer's accrued leave policy requires docking when an employee has been absent and the

      - employee has not sought permission to use accrued time;
      - employee has sought permission, but has been denied;
      - employee has used up all accrued time;
      - employee requests leave without pay; or
      - the employer institutes partial-week furloughs. **See 29 CFR § 541.710.**

4. **Deductions for Partial First or Last Week of Work**
   An employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. **See 29 CFR § 541.602(b)(6).**

A. Deductions from Pay Affecting *Both* Exempt and Nonexempt Employees

1. Deductions for the Overpayment of Wages

When the employer has accidentally paid an employee more than it owes the employee in wages, it may deduct the amount of overpayment from the employee's wages either in a lump sum or over time.

a. This will not destroy the exemption of an exempt employee.

b. With respect to nonexempt employees, "the principal may be deducted from the employee's earnings even if such deduction cuts into the minimum wage or overtime pay due the employee under the FLSA. This is in contrast to deductions for loss or damage to employer property (discussed below). **See Wage and Hour Opinion Letter FLSA 2004-19NA (October 8, 2004).**

2. Deductions for Advances of Vacation and Sick Leave

Neither FLSA regulations nor any cases before the federal Fourth Circuit Court of Appeals or a North Carolina federal district court address deductions to repay advanced paid vacation or sick leave. Nevertheless, certain principles may be inferred from existing rules and cases.

a. First, nothing prohibits an employer from deducting from current wages an earlier advance of wages. Vacation and sick leave are an alternate form of compensation that have a cash value and as such, an advance of leave is equivalent to an advance of wages. The U.S. Department of Labor Field Operations Manual considers advances of paid accrued leave to be an advance of salary.

b. As with an advance of salary, the deduction for repayment of an advance of vacation or sick leave ***may*** reduce below minimum wage the amount of money the employee receives after the deduction is made.

c. Deductions must be made based on the hourly rate the employee was earning at the time that leave was advanced, not at the rate the employee was earning at end of employment.

d. The practice of deducting from final wages any advance of vacation or sick leave must be incorporated into your personnel policy before you may make such deductions. **See U.S. DOL Field Operations Handbook § 30c10(c); Wage and Hour Opinion Letter FLSA 2004-17NA (October 6, 2004).**

3. Deductions for the Destruction or Loss of Employer Property or Money

Exempt Employees:

a. To deduct the cost of lost or damaged property or missing funds from the wages of an exempt employee will destroy the exemption.

The rationale behind this is that when an employer seeks reimbursement for the destruction or loss of employer property or money from an employee, it is holding the employee responsible for the loss. As such, it is counting the loss as a failure by the employee in the performance of his or her duties. To deduct from the wages of an exempt employee for deficiencies in the quality of the employee's work is inconsistent with payment on a salary basis, which requires that the salary be guaranteed irrespective of the quality or quantity of work. **See Wage and Hour Opinion Letter FLSA 2006-7 (March 10, 2006).**

b. The deduction would also violate the FLSA's requirement that wages be paid unconditionally and "free and clear," with no deductions being made for the benefit of the employer.

Nonexempt Employees:

a. The FLSA requires that wages be paid unconditionally and "free and clear." According to the U.S. Department of Labor's FLSA regulations, "[t]he wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." Thus, as a general matter, deductions from an employee's paycheck that benefit the employer are unlawful.

b. Although voluntary deductions are permitted, voluntary deductions to pay back the employer for lost or damaged uniforms, property or equipment are arguably for the employer's benefit and will run afoul of the free and clear rule unless the following requirements are met. There are different requirements for overtime workweeks.

Workweeks without Overtime

i. The deduction cannot reduce below the rate of the minimum wage the amount of money the employee receives in compensation.
See 29 U.S.C. § 206; 29 CFR §§ 531.35 and 531.36.

ii. If an employee admits to or is convicted of stealing or other misappropriation of funds, the amount may be deducted in full from the employee's wages even if it reduces the employee's wages below minimum wage.

Overtime Workweeks

i. The deductions may only be made if there is an agreement between the employer and the employee that deductions will be made for specific items. **See 29 CFR §531.37(a).**

The reason for the requirement that there be an agreement is that under 29 CFR §778.315, employers must pay employees all of their straight time compensation due under an express or implied employment contract (which all employees have) for the non-overtime hours worked before it can be said that the employer has paid proper time-and-one-half overtime compensation for the overtime hours worked.

A. The agreement must be reached before the employee performs the work that becomes subject to the deductions.

B. The agreement must be specific concerning the particular items for which the deductions will be made, and the employee must know how the amount of the deductions that are covered by the agreement will be determined.

C. The employee must affirmatively agree or assent to the employer's deduction policy. While the employee's assent to the policy may be written or unwritten, the burden of proof that an employee has agreed to the deduction policy rests on the employer.

D. Deductions from wages where no prior agreement exists as to particular items are never permitted in an overtime work week. **See Wage and Hour Opinion Letter 2001-7 (February 16, 2001).**

ii. The total amount that an employer may deduct from an employee subject to overtime pay in an overtime workweek may not exceed the amount that could be deducted if the employee had only worked a 40-hour week.

A. In other words, the deduction cannot reduce below the minimum wage the amount of money the employee receives in compensation for straight-time hours.

iii. The employee's regular rate for calculating time-and-one-half overtime pay cannot be affected by the deduction and remains the regular hourly rate or regular salary before the deductions are made. **See 29 CFR §531.37(b).**

A. In other words, the deduction cannot reduce the amount of overtime pay that the employee receives.

iv. Where no express or implied agreement exists as to deductions for particular items, or if the employer reduces an employee's wages for a reason not addressed in the contractual arrangement or for no legitimate reason, the deductions are considered illegal and are not allowed during overtime workweeks.

4. Deductions for the Cost of Training

Numerous local governments have adopted policies requiring police officers or firefighters to repay a portion of their training costs if they voluntarily leave the local government's employment before completing a specified number of years of service. As with deductions from pay for damage to or loss of the employer's equipment**, this practice appears to be permissible so long as employees are advised of the policy at the outset of employment and the deduction does not bring the employee's regular rate of pay below minimum wage.**

a. Neither the FLSA regulations nor any federal Fourth Circuit Court of Appeals or North Carolina federal district court cases address deductions for the cost of training.

b. Two cases from other circuits, however, provide a rationale for allowing such a practice.

i. In Heder v. City of Two Rivers, Wisconsin, 295 F.3d 777 (7th Cir.2002), the city employer funded its firefighters' mandatory paramedic training but required a firefighter to reimburse the city for the costs of training if the firefighter left the city's employment before completing three years of service. The Seventh Circuit upheld the reimbursement agreement, comparing it to a loan; the cost of the training was a loan the city made to its firefighters, repayment of which was forgiven after three years. If, however, a firefighter left before three years of service, the loan became due. The court held that as long as the city paid departing firefighters at least the statutory minimum wage, it could deduct the training costs from wages.

ii. In Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir. 2010), the Ninth Circuit held similarly. The court interpreted the arrangement thus: instead of requiring applicants to independently obtain their police training prior to

beginning employment, which the city could do by hiring only individuals already possessing law enforcement certification, the city elected to make what was essentially a loan to police officer trainees of the cost of their police academy training. In this case, the conditional offer the plaintiff signed explained that the city would forgive her repayment obligation at the specified rate and that she would owe nothing after five years of service. Because the plaintiff chose not to serve the five years necessary to secure complete loan forgiveness, the city was the plaintiff's creditor. Because it satisfied the FLSA's requirements by paying her at least minimum wage for her final week of work, it did not violate the law.

5. Deduction for Unpaid Utility Bills Owed to the Employing Jurisdiction

Unlike the cost of training or the replacements cost of damaged or lost property, unpaid utility bills are not debts related to a person's employment. There is no authority for a local government employer to deduct unpaid utility bills from the wages of an employee who owns property within the jurisdiction. An agreement by the employee allowing such a deduction would violate the FLSA's free and clear rule and would constitute an impermissible waiver of the employee's rights under the FLSA.

6. Deductions in Response to Garnishments and Court Orders

a. With three exceptions, public employers should not garnish the wages of their employees except in accordance with an order of the North Carolina Superior Court or the U.S. Bankruptcy Court. The Consumer Credit Protection Act (CCPA) at 15 U.S.C. § 1671 – 1677 restricts the amount that may be deducted from an employee's wages to satisfy a court-ordered garnishment. In general, the CCPA limits the amount of earnings that may be garnished in any workweek or pay period to the lesser of:

- 25 percent of disposable earnings, or
- the amount by which disposable earnings are greater than 30 times the federal minimum hourly wage.

The court order imposing the garnishment will take the CCPA's restrictions on garnishment into account in calculating the amount of the garnishment. The U.S. Department of Labor's Wage and Hour Fact Sheet #30 summarizes the CCPA's requirements for the garnishing of wages and is attached at the end of this outline.

b. Three kinds of garnishments do <u>not</u> require a court order:

i. Garnishments for unpaid taxes

A. IRS – requires only a "Notice of Levy on Wages" (IRS Form 668-w)
An IRS garnishment (technically, a "levy") is not subject to any limitation on the amount that may be deducted from wages.

B. NC Dep't of Revenue – requires only a notice of garnishment (<u>see</u> G.S. § 105-242.1)
A state tax garnishment is subject to a limitation of 10% of disposable income.

C. Local tax collector -- requires only a notice from the tax collector (<u>see</u> G.S. § 105-368[b])
A local tax garnishment is subject to a limitation of 10% of disposable income.

ii. Federal student loan guaranty agencies (pursuant to the Higher Education Act)
Garnishment is subject to a limitation of 10% of disposable income.

iii. Other non-tax federal administrative garnishments (pursuant to the Debt Collection Improvement Act)
Garnishment is subject to a limitation of 15% of disposable income.

c. Garnishments for child support and alimony will be issued either by the Superior Court or by a child support enforcement agency (without a court order but impliedly under the authority of a court order), but are not subject to the limitations imposed by the CCPA on general creditors.
Garnishments for child support and alimony are limited to 50% of disposable income if the employee is supporting a spouse or child not covered by the alimony or child support order and 60% of disposable income if the employee is not supporting another spouse or child. The amount may be increased by an additional 5% if the employee is more than 12 months in arrears.

Bottom Line: The court or agency issuing the garnishment will reference the applicable limitations on the amount to be garnished. The employer does not have to worry about whether or not it will bring the amount that the employee is actually paid below the rate of the minimum wage.

7. Across-the-Board Pay Cuts

Pay cuts imposed on all employees across the board are lawful, as are any pay cuts that do not bring an employee below the minimum wage, even if they are limited to employees of some departments, but not others, or to employees with more seniority, but not to newer hires.

a. With the exception of the setting of the minimum wage and with the rules governing the payment of overtime and use of comp time, the FLSA has nothing to say about wage increases or decreases – they remain within the discretion of the employer. Thus, except where there is an employment agreement for a specific term (such as those that cities and counties frequently enter into with their managers), public employers are generally free to either increase or decrease employee compensation as they see fit.

b. Public employees have on occasion challenged reductions to their rate of pay or to other forms of compensation, but the courts have routinely rejected the notion that a public employee has a vested right in any rate or method of compensation.

See, e.g., Abeyounis v. Town of Wrightsville Beach, 102 N.C.App. 341, 344 (1991); Keeling v. Grand Junction, 689 P.2d 679, 680 (Colo.App. 1984) (firefighters and police do not have vested contract right and could have reasonably have relied on continuance of a particular rate or method of compensation); Chicago Patrolmen's Benevolent Ass'n v. City of Chicago, 309 N.E.2d 3, 6 (1974) (public employees have no property rights in the continuance of any specific rate or method of compensation). But cf. Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore, 6 F.3d 1012 (4th Cir. 1993) (holding that inclusion of wage rate negotiated by teachers' and police officers' unions with city in city budget ordinance created a contractual right to that rate of compensation for the life of the budget).

c. Wages may not, however, be reduced in retrospect. An employee must know and consent to work for the amount the employer is willing to pay for a day's work before he begins work. That being said, there is no statutory minimum amount of notice that must be given before an employer institutes an across-the-board cut.

8. Furloughs

a. **Nonexempt employees** continue to be paid as they always are: at a set rate of pay for those hours actually worked in a given workweek.

b. **Exempt employees** may also be furloughed. If a government employer treats exempt employees as nonexempt during a furlough week and pays them at a pro-rata rate for those hours actually worked, then the employer will not lose the exemption for that position in non-furlough weeks. In other words, the employer must require exempt employees to track their time, if they do not already do so, and must ensure that they limit the number of hours worked.

   i. If an exempt employee regularly works in excess of 40 hours a week in order to get his or her work done, and works a similar number of hours during the furlough week, he or she must be paid overtime at time and one half. This will likely undo the purpose of having a furlough week in the first place.

   ii. See 29 CFR 541.710(b):
   Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

VOLUNTEERS AND INTERNS

1. Volunteers

An individual who performs service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered services is a volunteer if:

a. the individual in fact receives no compensation or is paid only expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered;

b. their services are offered freely and without pressure or coercion, direct or implied, from an employer, and

c. the individual is not otherwise employed by the local government to perform the same type of services. **See 29 USC § 203(e)(4)(A); 29 CFR §§ 553.101 and 553.104.**

i. Here's what the FLSA regs say about "same type of services:" *The phrase "same type of services" means similar or identical services. In general, the Administrator will consider, but not as the only criteria, the duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles in determining whether the volunteer activities constitute the "same type of services" as the employment activities. Equally important in such a determination will be the consideration of all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.* **See 29 CFR § 553.103.**

ii. Examples of employee volunteers who are performing the "same type of services" include:

A. a nurse employed by a state hospital who proposes to volunteer to perform nursing services at a state health clinic;

B. employee firefighters in a mixed employee-volunteer fire department cannot volunteer for the same department in their off-duty hours.

iii. Examples of employee volunteers who are **not** performing the "same type of services" include:

A. a city police officer who volunteers as a part-time referee in a city parks and rec basketball league;

B. an employee of the city parks department who serves as a volunteer city firefighter;

C. an administrative assistant in the department of aging who volunteers with the meals-on-wheels program sponsored by the department for humanitarian and charitable reasons.

Volunteers may be paid expenses, reasonable benefits, a nominal fee, or combination of the three without losing their status as volunteers.

Examples of permissible expenses, benefits or fees include:

a. a uniform allowance;

b. reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing;

c. reimbursement for out-of-pocket expenses incurred while providing volunteer services, such as payment for the cost of meals and transportation expenses;

d. reimbursement for tuition, transportation and meal costs involved in attending classes intended to teach volunteers to perform their services;

e. either books, supplies, or other materials essential to volunteer training or reimbursement for the cost of such items;

f. inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans;

g. "length of service" awards recognizing continuing commitment by a volunteer; or

h. a nominal amount on a "per call" or similar basis to volunteer firefighters, law enforcement reserve officer or emergency medical personnel.

A. A nominal fee may not be tied to productivity.

B. The U.S. Department of Labor will consider the following factors in determining whether a given amount is nominal:

- distance traveled;
- the time and effort expended by the volunteer;
- whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and
- whether the volunteer provides services as needed or throughout the year.
    - an individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

2. Interns

a. The FLSA prohibits the use of unpaid interns by private employers unless the internship arrangement meets the following requirements:

i. the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

ii. the internship experience is for the benefit of the intern;

iii. the intern does not displace regular employees, but works under close supervision of existing staff;

iv. the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

v. the intern is not necessarily entitled to a job at the conclusion of the internship; and

vi. the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

See Wage and Hour Fact Sheet No. 71, available on the U.S. Department of Labor's website, www.dol.gov .

If any of the above criteria are not met, then the worker is an employee and is not an intern. Very few internship arrangements meet this test as most employers desire to gain some benefit from bringing an intern into the organization and many feel they must offer some form of compensation (a "stipend" is just "wages" by another name).

b. In the public sector, it is best to think of an intern as a form of volunteer.
In contrast to its warnings about private-sector internships, Wage and Hour Fact Sheet #71 says, "**Unpaid** internships in the public sector and for non-profit charitable organizations, where the intern **volunteers without expectation of compensation**, are generally permissible" (emphasis added).

b. **Conclusions**:

i. Public employers may freely avail themselves of the services of "interns" if they treat them as volunteers and do not pay them any more than reimbursement of direct expenses and a de minimis token of appreciation.

ii. A public employer may not pay "interns" a stipend that amounts to less than the minimum wage. If a public employer wishes to pay an intern a stipend, then the intern becomes a temporary employee, subject to minimum wage and all of the other applicable requirements of the FLSA.

iii. Interns can be true volunteers or they can be employees. There is no legally in-between status of "intern."

COMPENSABLE WORKING TIME

For FLSA purposes, "hours worked" are:

1. All time during which an employee is required to be on the employer's premises or at some other assigned workplace; and
2. All time during which the employee is "suffered or permitted to work."
   See 29 U.S.C. 203(g); 29 CFR §§ 785. 7, 785.11.

1. Preliminary and Concluding Activities:

a. The FLSA does not require employers to compensate employees for preliminary and post-work activity that is incidental to the performance of their duties. Time spent on pre- and post-work activities warrants compensation only when the activities are closely related to the employee's principal activity and are indispensable to its performance. The kinds of activities about which issues arise most frequently are putting on uniforms and protective gear, moving and preparing equipment, and shift-change activities.

b. Examples of Compensable Preliminary or Post-Work Activities:

   i. changing into required safety gear, as in a chemical factory or a meatpacking plant;
   ii. cleaning machines used in manufacturing;
   iii. driving a company truck to the work site;
   iv. caring for and transporting police dogs;
   v. reporting to work 10 or fifteen minutes early or staying 10 or 15 minutes late so that the incoming shift may be briefed;
   vi. conducting safety precautions, and
   vii. other endeavors performed for the benefit of the employer.

c. Examples of Non-Compensable Activities:

   i. riding to a work site on a bus provided for the employees' convenience;
   ii. waiting on line to enter the worksite or to punch a time clock;
   iii. waiting on line put on required safety gear or to use showers after exposure to chemical during the work day, where time spent putting on the gear or taking the shower is compensable.
   See 29 U.S.C. § 254; 29 CFR §§ 785.24(c) and 785.25; IBP v. Alvarez, 546 U.S. 21 (2005).

2. Bona Fide Meal Periods

In order for a meal break to be non-compensable,

a. it must be at least thirty minutes in length; and
b. the employee must be completely relieved of duties.

The employee does not, however, have to be allowed to leave the premises.
See 29 CFR § 785.19.

***Bona Fide Meal Periods for 207(k) Personnel**:*

a. Law enforcement tour of 24 hrs or less:
Meal periods of 30 min. may be excluded unless officers are on-call during that time.

b. Firefighter Shift of 24 hrs or less:
Meal periods may NOT be excluded.

c. Law Enforcement & Firefighters on Duty More than 24 hrs:
Meal periods may be excluded if they are 30 min. and employee is relieved of duties (that is, the employee is not on-call).
See 29 CFR § 553.223.

3. **Sleep-Time**:
Shifts that are less than 24 hours may not exclude sleep time. If a shift is exactly 24 hours or more than 24 hours, sleep may be excluded if the following requirements are met:

   a. no more than 8 hours can be excluded;

   b. express or implied agreement required;

   c. employer must provide adequate sleeping facilities; and

   d. employee must be able to get at least 5 hours of uninterrupted sleep.
   See 29 CFR §§ 785.21 and 785.22

Sleep Time for 207(k) Personnel:
Shifts must be *more than* 24 hours before sleep time can be excluded. If a shift is exactly 24 hours, sleep time may not be excluded. If a shift is more than 24 hours, sleep time may be excluded if the following requirements are met:

   a. no more than 8 hours can be excluded;

   b. express or implied agreement required;

   c. employer must provide adequate sleeping facilities; and

   d. employee must be able to get at least 5 hours of uninterrupted sleep.
   See 29 CFR § 553.222 .

4. **On-call Time: 29 CFR § 785.17** reads:

   An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. **See also Armour & Co. v. Wantock**, 323 U.S. 126 (1944) (where firefighters employed by packing company at its soap factory were on duty for 24 hours, but during the nighttime were only required to remain in fire hall subject to call, time spent in amusements or in idleness while subject to call constituted compensable time within meaning of the FLSA).

   a. *In other words,* the issue is whether the time is being spent primarily for the benefit of the employer or whether the employee, while waiting for a call, can use the time for his or her own benefit. Employers may impose some restrictions on employees who are on-call – such as requiring them to abstain from alcohol consumption – without the time becoming compensable.

b. Factors considered by the courts in determining whether on-call time is compensable:

   i. required response time;

   ii. use of a pager to ease restrictions;

   iii. ability to trade on-call shifts;

   iv. excessive geographical limitations;

   v. employee's ability to engage in personal activities; and

   vi. frequency of calls.

c. Examples of on-call time that is compensable:

   i. Fire fighters required to report to the station house within 20 minutes of being paged in appropriate physical condition to work, who were called back to work an average of three to five times per 24 hour on-call period, could trade on-call shifts only with great difficulty and were effectively precluded by their schedules from obtaining a second job;

   ii. Forestry service employees required to remain within 50 miles of the work site, who could not participate in social or other activities that would prevent them from monitoring radio transmissions, and who had to respond to an emergency call within 30 minutes and could not obtain relief from the on-call status because they were subject to call 24 hours per day.

d. Examples of On-Call Time That Is Not Compensable

   i. Water and sewer department employees who could wear pagers, could not consume alcoholic beverages and were called back to duty an average of less than once per day;

   ii. Police detectives called less than twice per week, who could be reached by pager, and who had to remain sober and report to duty within 20 minutes of responding to a pager.

5. **Training Time**

Employees do not have to be compensated for training time if:

a. attendance is outside the employee's regular working hours;

b. attendance is voluntary;

c. the course is not directly related to the employee's job; and

d. the employee does not perform any productive work during time in attendance at the course. **See 29 CFR § 785.27.**

6. Travel Time

a. From home to work

i. Normal travel from home to work is not compensable time. **See 29 CFR § 785.35.**

ii. Travel from home after the end of the work day to respond to an off-the-worksite emergency would be compensable time. **See 29 CFR § 785.36.**

iii. If an employee is on-call and is called back to work, the time spent traveling to and from work is compensable.

b. Away from Home Community

i. Travel away from home is compensable when it occurs during the employee's workday. The employee is simply substituting travel for other duties.

ii. Travel away from home is compensable when it occurs during what would be working hours, but on nonworking days.

A. If an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, travel time on from 9 a.m. to 5 p.m. on Saturday and Sunday is also compensable time.

iii. Time traveling away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not compensable.
See 29 CFR § 785.39; see also § 785.37.

7. Attending Grievance Hearings: Always compensable when held during the employee's regularly scheduled workday. **See 29 CFR § 785.42.**

8. **Medical Appointments for the Employer's Benefit or at the Employer's Direction**

Time spent by an employee waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours is compensable. But if an employee is injured on the job and some of the required medical treatment is provided after working hours or on non-working days, that time is not compensable.
See 29 CFR § 785.43.

9. Telecommuting/Working from Home:

There are no special rules governing telecommuting or working from home. There are, however, FLSA issues that are likely to arise and that employers should address in advance of allowing employees to work from afar.

a. How will you know when the employee begins and ends the work day?

b. How will you know that the employee is actually working and not shopping on the internet?

c. How can you prevent employees from working after hours and incurring overtime without permission?

Remember that when an employee files a complaint with the U.S. Department of Labor, the burden of proof as to the hours actually worked is on the employer.

10. The Special Case of Caring for K-9s

Time spent by law enforcement officers grooming, feeding and otherwise caring for police dogs has generally been analyzed by the courts and by the U.S. Department of Labor in opinion letters as preliminary or post-work activity that is closely related and indispensable to the officer's principal duties.

a. The police agency and the employee may agree that K-9 duties will be compensated at a lower hourly rate than the officer's other duties and that overtime associated with dog-handling will be calculated on the basis of the lower rate.

ISSUES IN OVERTIME COMPENSATION

1. Second Job for the Same Employer

a. For the purposes of the FLSA, all hours worked by a nonexempt employee for the same employer count toward assessing the employee's right to overtime in a given workweek. This is true even where the employee is working two, unrelated jobs.
See 29 CFR § 778.103.

b. An employer has two options for paying an nonexempt employee who has a second nonexempt job with that same employer.

i. Where a nonexempt employee performs two or more different kinds of work for two different straight time hourly rates, the employer and employee may agree in advance that the employee will be paid time-and-one half of the bona fide regular rate of the job that is performed during the overtime hours. **See 29 CFR § 778.419.**

ii. In the absence of such an agreement, the employee's regular rate for that week is the weighted average of such rates. This means, in the words of the regulations, that "his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs." **See 29 CFR § 778.115.**

c. Where an exempt employee takes a second job that is nonexempt, the hours worked at the second job are paid at the regular straight-time rate for that job.

d. Where a nonexempt employee takes a second job that is exempt, the employee must be compensated at a time-and-one-half overtime rate for any hours worked over 40.

2. The Occasional and Sporadic Second Job

Where a local government employee works occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different job do not have to be counted for the purpose of overtime but may be paid at a straight time rate. **See 29 U.S.C. 207(p)(2); 29 CFR 553.30.**

a. The terms "occasional" and "sporadic" mean infrequent, irregular, or occurring in scattered instances. The work can be recurring (an event held every fall or every holiday season), but it cannot be regular (weekly or monthly according to a regular schedule). Examples of occasional and sporadic part-time work include:

i. the taking of tickets or providing security for special events such as concerts, team sporting events or lectures at stadiums or auditoriums;

ii. officiating at special youth or other recreation and sports events at public recreation and park facilities;

iii. assisting in food or beverage sales at concerts, sports events or special events such as a county fair.

b. In order to exclude such hours from overtime, the occasional or sporadic work may not be within the same general occupational category as the employee's regular work.

i. In deciding whether occasional and sporadic work is in a different capacity, the U.S. Department of Labor will consider the duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles, as well as all the facts and circumstances in a particular case.

ii. Examples of occasional and sporadic activities that are in a different capacity from an employee's regular work include:

A. an employee of the finance department *occasionally* refereeing for an adult evening basketball league sponsored by the parks and recreation department;

B. a bus driver may assisting in crowd control at a winter festival;

C. an administrative assistant *substituting* as a coach for a youth basketball team;

D. a maintenance engineer providing instruction on auto repair as part of a single-day parks and recreation program.

iii. Examples of occasional and sporadic activities that would **not** be considered in a different capacity from an employee's regular work include:

A. a parks and recreation employee primarily engaged in playground maintenance who also from time to time cleans an evening recreation center;

B. public safety employees taking on any kind of security or safety function within the same local government – such assignments are **never** considered to be employed in a different capacity.

c. In order to exclude the occasional and sporadic work, the employer may not order or pressure employees to undertake the work. Employees must be working the occasional and sporadic assignment at their own free choice.

3. Employees of City or County Owned Seasonal Amusement or Recreational "Establishments"

Positions that work at a seasonal amusement or recreational establishment are exempt from overtime. The key concepts here are "seasonal" and "establishment." **See 29 CFR § 779.385.**

a. For a position to qualify for this exemption, its duties must be performed at a facilities that it is a distinct, physical place of business that is separate from the main administrative location of the organization. Examples of public-sector facilities qualifying as establishments include beaches, golf courses, and swimming pools.

b. To be "seasonal" establishment, the facility must be one that does not operate for more than seven months in any calendar year.

c. Year-round employees who spend part of the year worked at a seasonal amusement or recreational establishment and the other part of the year working at the city or county's year-round operations are exempt for overtime for those duties performed at the seasonal establishment, but must be paid overtime during that part of the year that they are working at the main facility.

4. Special Detail Assignments

Employees who engage in law enforcement or fire protection activities as they are defined by the FLSA may agree to work a so-called special detail assignment for a **separate and independent employer** without the hours worked on special detail counting toward overtime with the public employer. **The employee must accept the special detail assignment voluntarily for the exemption to apply.** If the law enforcement or fire agency assigns employees to special detail duty as a requirement of the primary employment, the exemption is not available and the hours will count toward overtime with the primary agency. **See 29 CFR § 553.227.**

a. It is permissible for the public employer to maintain a list of employees available to work special detail and to choose the employees to work individual special detail assignments from the list of those who are interested in participating.

b. Wages for the special detail assignment may be paid directly to the employees or may be made to the employing agency and processed through the local government's payroll. The local government may negotiate the rate that the law enforcement officers or firefighters will receive for the special detail with the separate and independent employer. The employing agency may also charge an administrative fee to the separate and independent employer.

c. The employing agency may require that employees on a special detail assignment observe normal standards of conduct and take disciplinary action against those who fail to do so.

d. Public employers may also prohibit or restrict outside work of this kind by their law enforcement and firefighter employees.

5. When One Nonexempt Employee Substitutes for Another on a Shift

Sometimes employees who work on scheduled shifts for which full coverage is essential want to switch shifts or have one employee substitute and work the shift of another who works in the same capacity to cover an absence. When such switching or covering is voluntarily done by the employees involved, and with the approval of management, the hours worked by the substituting employee will be paid as straight time and will not count as hours worked for the purposes of overtime. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift. This exception is limited to the public sector. **See 29 U.S.C. § 207(p)(3); 29 CFR § 553.31.**

a. An employer may suggest that an employee substitute for another employee, but each employee must be free to refuse to do so without sanction and without being required to explain or justify the decision.

    i. When an employer orders an employee to substitute or cover for another, then the hours worked by the substituting employee count toward overtime for that employee.

b. The employer does not have to keep a record of the hours of the substitute work.

COMPENSATING EMPLOYEES WITH FLUCTUATING HOURS

1. The 207(k) Exemption for Law Enforcement and Firefighting Employees

At 29 U.S.C. § 207(k), the FLSA allows for public agencies to pay overtime compensation to employees who are scheduled in work periods of 28 consecutive only after 212 hours of work in the case of fire protection employees and only after 171 hours of work for law enforcement employees. Where public agencies schedule law enforcement and fire protection employees in work periods of at least 7 but less than 28 consecutive days, overtime compensation is required according to the following schedule:

	Law Enforcement	Fire Protection
28 days	171 hrs.	212 hrs.
14 days	86 hrs.	106 hrs.
7 days	43 hrs.	53 hrs.

Employees scheduled in accordance with section 207(k) may be compensated for overtime hours worked with compensatory time off rather than with cash overtime pay.

a. Establishing the 207(k) Exemption:

i. Requires notation in payroll records showing length of period and starting date / time. **See 29 CFR § 553.51.**

ii. Notation should state schedule adopted "pursuant to section 207(k) of the FLSA and 29 CFR Part 553.

iii. Does not require DOL approval or employee agreement.

iv. Does not have to coincide with payroll periods.

b. Who Qualifies as a Law Enforcement Officer for 207(k) Purposes?

i. Uniformed or plainclothes members of a body of officers,

ii. who have the statutory power to enforce the law, and

iii. who have the power to arrest, and

iv. who have participated in a special course of law enforcement training.

v. An unsworn jailer counts as a law enforcement officer for 207(k) purposes, but other civilian employees of the police or sheriff's department do not.

c. Who Qualifies as a Firefighter for 207(k) Purposes?

Any employee who:

i. is trained in fire suppression;

ii. has the legal authority and responsibility to engage in fire suppression;

iii. is employed by a fire department, and

iv. is engaged in either preventing, controlling and extinguishing fires, or responding to emergency situations where life, property or the environment is at risk.
See 29 CFR § 553.210.

d. **Use of the 207(k) exemption is limited to public employers.**
The 207(k) exemption may not be used by a nonprofit 501(c)(3) organization providing fire protections or law enforcement services even if it does so under contract with a city or county. **See 29 CFR § 553.202.**

2. Law Enforcement and Fire Departments with Fewer than Five Employees

a. If a local government employs fewer than five law enforcement officers or fewer than five firefighters in any given workweek, those positions will be exempt from overtime during that workweek.

b. Law enforcement positions and fire protection positions are considered separately for the purposes of this exemption. For example, if a local government employs fewer than five employees in fire protection activities, but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees.

c. No distinction is made between full-time and part-time employees, or between employees on duty and employees on leave. All such categories must be counted in determining whether the department employs fewer than five.

d. The exemption applies on a workweek basis. It is therefore possible that employers may have to pay overtime for hours worked over 40 in some weeks, but not in others. In those workweeks in which the employer has five or more law enforcement officers or five or more firefighters, it may schedule those employees using the 207(k) exemption.
See 29 U.S.C. § 213(b)(20); 29 CFR § 553.200.

3. The Fluctuating Workweek Method of Overtime Compensation May Be Used for Non-Law Enforcement and Non-Firefighting Employees Whose Hours Vary from Week to Week.

a. Under the fluctuating workweek method, an employee whose hours vary from week to week is paid a fixed salary to cover whatever hours job demands in a given week — up to 40.

   i. The amount of the salary must be great enough to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours s/he works is greatest.

b. Overtime hours -- any hours the employee works in excess of 40 -- is paid at ½ the regular rate.

c. Note that regular rate will vary from week to week because fixed salary will be divided by a different number of hours worked each week.
See 29 CFR § 778.114.

CALCULATING AN EMPLOYEE'S REGULAR RATE OF PAY

The regular hourly rate of pay of an employee is determined by dividing his total compensation for employment in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

1. **If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate."** For any overtime hours that the employee has worked, the employee must be paid a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week.

2. **If an employee who is employed solely on the basis of a single hourly rate receives any additional compensation, such as a performance bonus or an on-call bonus, that sum must be added to the total of the hourly rate multiplied by hours worked to determine the regular rate.** That aggregate amount divided by the number of hours worked will yield the regular rate upon which overtime must be calculated.

3. **The applicable regulation is 29 CFR § 778.110:**

   ***Hourly rate employee*.**

   (a) *Earnings at hourly rate exclusively*. If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours of work the employee 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 in excess of 40 in the week. Thus a $12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588.

   (b) *Hourly rate and bonus*. If the employee receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50).

4. **A Further Example:** A nonexempt employee with an hourly rate of $10.00 per hour works 45 hours in a given workweek. The governing board and the manager have adopted a performance challenge pursuant to which this employee receives a $100 bonus for the workweek that has just ended. The bonus is paid in that same workweek in which the employee works 45 hours. To determine the regular rate for that week, the employer multiplies 45 hours by $10.00 per hour to get $450.00. The employer must then add the $100.00 bonus to the $450.00 to get $550.00. It is this total amount -- $550.00 – that the employer divides by 45 hours to get the employee's regular rate, which is, for that week only, $12.22. The employee's overtime rate is then $18.33. The employee must be paid 40 hours at the regular rate of $12.22 (a total of $488.80) and 5 overtime hours at $18.33 (a total of $91.65) for a total of $580.45. An alternate way of calculating this is to multiply the total

number of hours worked by the regular rate – 45 times $12.221 for a subtotal of $549.90 – and add that to the number of overtime hours worked multiplied by ½ of the regular rate – 5 times $6.11 for a subtotal of $30.55 – to get a total gross of $580.45.

4. **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 calculated by dividing the salary by the number of hours which the salary is *intended* to compensate.**

5. **The applicable regulation is 29 CFR § 778.113:**

   Salaried employees - general.

   (a) *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. 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.

   (b) *Salary for periods other than 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 is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,560, or a regular semimonthly salary of $780 for 40 hours a week, is thus found to be $9 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

6. Additional Examples

a. If a nonexempt employee is hired at a salary of $450 and if it is understood that this salary is compensation for a regular workweek of 40 hours, the employee's regular rate of pay is $450 divided by 40 hours, or $11.25/hour. The time-and-one-half overtime rate will be $16.88. If the employee works 45 hours in a given workweek, then the employee receives $450 for the 40-hour week and $16.88 multiplied by 5, or $84.40 for the overtime hours, for a total gross of $534.40.

b. A nonexempt employee is hired at a salary of $450 and it is understood that this salary is compensation for a regular workweek of 37.5 hours, rather than 40 hours. The employee's regular rate of pay is $450 divided by 37.5 hours, and is therefore $12.00/hour. If the employee works 45 hours in a given workweek, then the

employee must be paid $12 for each of the first 40 hours (remember, the salary is intended to cover 37.5 hours) (a total of $480.00 for straight time) and $18.00 (one and one-half times $12) multiplied by 5 (or $90.00) for the five hours of overtime for a total gross of $570.00.

4. Compensation for On-Call Time and the Regular Rate

a. Where the on-call time is compensable, the time spent on-call is used in calculating the regular rate.

b. Where the on-call time is not compensable, and there are no calls, there is nothing to add to the employee's compensation for the purposes of calculating the regular rate.

c. Where the on-call time is not compensable, but the employee is called in, the hours during which the employee works are regular work hours and are included in the regular rate just as any work hours would be.

d. Where the on-call time is not compensable, but the employer pays on-call employees a set amount for each period that the employee is on-call (for example, $25.00 per on-call shift, plus the employee's regular hourly rate for any time during which the employee is actually called into work), the on-call fee (that is, the $25.00) is included in calculating the regular rate. The hours during which the employee works are regular work hours and are included in the regular rate just as any work hours would be. **See 29 CFR § 778.223.**

5. The FLSA requires that all compensation for employment be included in calculating the regular rate. There are only seven exceptions to this requirement that are applicable to public employers. They are:

a. ***discretionary* bonuses**, that is, those which may be given or not in the sole judgment of the employer (see 29 CFR § 778.211); **bonuses that are *not* considered discretionary and which *must* be included in the regular rate include:**

i. bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the organization;

ii. attendance bonuses;

iii. individual or group production bonuses;

iv. bonuses for quality and accuracy of work; bonuses contingent upon the employee's continuing in employment until the time the payment is to be made.

b. gifts and payments marking special occasions such as a 10-year service anniversary or a holiday payment, so long as the amounts of the payment is not dependent on hours worked, production, or efficiency;

c. contributions by the *employer* to welfare benefit plans, such as health insurance or pension plans such as LGERS or the NC 401(k) Plan;

d. made for occasional periods when no work is performed due to vacation, holiday, illness, or failure of the employer to provide sufficient work – *this means that a payout of accrued unused sick, vacation or comp time is not included in the regular rate*;

e. overtime compensation itself – *this means that a comp time cash payout is not included in the regular rate*;

f. holiday pay or premium pay for work on the weekends is excludable from the calculation of the regular rate, but only if the holiday or premium pay rate is at least 1½ times the regular hourly rate;

g. premium pay for work outside the regularly scheduled workday or workweek (usually found in collective bargaining contracts).

See 29 U.S.C. § 207(e); 29 CFR 778, Subpart C - Payments That May Be Excluded From the "Regular Rate".

6. How to Include Longer-Term "Bonuses" in the Regular Rate

In contrast to discretionary bonuses, where it is up to the manager to decide to which employees and in what amount to award a bonus, some forms of "bonus" accrue to the employee automatically as a function of policy or ordinance. Discretionary bonuses do not have to be included in the calculation of the regular rate. Other forms of bonus, such as attendance bonuses or performance bonuses that are automatically granted if the employee meets a certain standard, must be included in calculating the regular rate. Here is a summary of the rules applicable to adding bonuses to the regular rate – the full rule may be found at 29 CFR § 778.209.

a. If a bonus is for work that has been done in a given pay period, the amount of the bonus is merely added to the other earnings of the employee and the total divided by total hours worked to get that week's regular rate.

b. Bonuses like lump-sum merit bonuses or lump-sum longevity payments are usually meant to compensate an employee for a period of time longer than a single workweek or single pay period. In that case, an employer does not have to take the bonus into account in calculating the hourly rate until the bonus is paid.

c. Some lump-sum bonuses are considered earned in an equal amount each week of the period to which the bonus relates. Sometimes, however, a lump-sum bonus is considered to have been earned only in certain of the workweeks of the period to which it relates, in which case the amount of the bonus must be proportionally allocated to those weeks in which it was considered earned. In either case, the employer will must retrospectively compensate the employee for the difference between the amount of overtime previously paid for those weeks and the amount of overtime the employee should have received had the appropriate pro-rate amount of the bonus been part of the calculation of the regular rate.

d. Longevity pay bonuses should be calculated differently and are the subject of the discussion below.

7. The regular rate of pay is based on the regular hourly rate or the regular before any non-statutory deductions are made. Deductions for salary advances, lost or damaged property, the recovery of training costs or for disciplinary reasons cannot be taken into account in determining the regular rate. When a nonexempt employee works overtime hours, lawful deductions may be made from the employee's non-overtime hours, but may not be taken into account in calculating overtime.

Calculating the Regular Rate and the Special Problem of Longevity Pay

The Regular Rate

For nonexempt employees, "hourly" rate of pay and "regular" rate of pay are two different things. They are closely related, but they are different. The hourly rate is the stated rate of pay that an employee is promised for each hour of work. Say Paramedic Joe's hourly rate is $10 per hour. If Paramedic Joe works 40 hours in a week, his paid $10 for each hour worked, or $400.

If Paramedic Joe works more than 40 hours in a week, he is entitled "time-and-one-half" pay as an overtime premium. But time-and-one-half of what? This is where things get tricky. It is time-and-one-half of Paramedic Joe's "regular rate." In a week in which Paramedic Joe is paid no payments of any kind other than pay for hours worked, the "regular" rate and the "hourly rate" are the same.

Say that Paramedic Joe works 45 hours one week. He receives no payments other than pay for time worked. Since he receives no other kinds of payment, his hourly rate and his regular rate are the same: $10 per hour. His time-and-one-half premium rate is $15 per hour. His pay for the week is $400 ($10 times 40) plus $75 ($15 times 5), a total of $475. Easy.

But suppose now that Paramedic Joe works a deal with his employer. He agrees to be on-call two nights a week for a straight payment of $27.50 per night. On a night when he is not called out, he gets the $27.50 and nothing more. On nights when he is called out, he gets the $27.50 plus he is paid by the hour for the hours he works while called out.

Now imagine that in another week, Paramedic Joe works 44 hours. He is entitled to his regular rate for the first 40 hours, and time-and-one-half his regular rate for the 4 overtime hours. But what is his regular rate this week? It is **not** $10 per hour. That is still his hourly rate, no question. But for this week it is not his "regular" rate. That is because this week Joe has received payments in addition to the pay for hours worked. He has received $55 for being on-call for two nights.

How, then, do we calculate his "regular" rate and figure out his time-and-one-half overtime rate?

The rule for calculating Paramedic Joe's regular rate this week is set forth in 29 CFR § 778.109 and in DOL's Field Operations Handbook at § 32b01: for any given workweek, the regular

hourly rate of pay is determined by dividing an employee's **total** pay (not counting the overtime premium) by the total number of hours he actually worked during that week.

The first step is to figure out Joe's total pay for the week. ***Multiply Joe's hourly rate, $10.00 per hour, by the total number of hours he has worked***, that is, 44 hours. The sum is $440.00. ***Add Joe's on-call bonus payment, $55.00 to $440.00 to get $495.00 of total compensation***. The next step is to ***divide total compensation by the total number of hours Joe has worked***, namely, 44 hours: $495.00/44 = $11.25. Joe's regular rate is $11.25 per hour, even though his hourly rate is $10.00 per hour. His overtime is therefore calculated as time-and-one-half of $11.25.

So this week, ***Joe is paid a total of $517.50***. That represents $450.00 straight time ($11.25 x 40) plus $67.52 overtime ($16.88 [time-and-one-half of $11.25] x 4 hours overtime).

Things are more complicated when a nonexempt employee is paid on a salary basis. The rule governing the calculation of the regular rate for salaried nonexempt employees is set forth at 29 CFR 778.113 and summarized in the DOL Field Operations Handbook at § 32b04a. It provides that the employee's hourly rate is determined by dividing the weekly salary by **the number of hours that the salary is intended to compensate**. Where employees are not regularly expected to work overtime hours, the number of hours that the salary is intended to compensate will usually be 40, although in a city or county where the regular workweek is 37.5 hours, that number might be the number of hours the salary is intended to compensate. If the employee does not receive any additional bonus compensation that week, then the hourly rate is the regular rate. If the employee receives additional bonus compensation, then the regular rate is determined by adding the amount of the bonus to the salary and then dividing that combined total by the number of hours for which the salary is meant to compensate the employee.

HR Guru Drake's earnings illustrate this principle. Drake is a ***salaried nonexempt*** employee. Drake is ***paid $456.00 per week for a 37.5 hour workweek***. This means that ***his hourly rate is $12.16 per hour*** (456 ÷37.5). This would be his regular rate during any week in which he received no other compensation. During a week in mid-January, however, Drake earns ***an additional $100 of holiday pay*** for working on National Hot Pastrami Day. This changes his regular rate for that week. ***Now he has earned $610.72*** (His hourly rate of $12.16 times 42 hours plus $100 holiday pay). We ***divide this $610.72 by the total number of hours he has worked that week and get a regular rate of $14.55*** for that week. **Drake should gross be paid $625.66**. That is the **sum of $582** (40 hours x the regular rate of $14.55) **plus 43.66** (time-and-one-half of Drake's regular rate of $14.55 times 2).

The Best Way to Make an Overtime Pay Adjustment to Include Longevity Pay in the Regular Rate

The FLSA regulations provide that all forms of monetary compensation, including nondiscretionary bonuses, are to be included in the calculation of the regular rate. Longevity pay is an example of a nondiscretionary bonus because it is automatically awarded if an employee reaches a benchmark length of service. Put another way, longevity pay is a bonus paid as incentive to employees to remain with the same employer, and both the amount of the bonus and the conditions that an employee must satisfy to earn it are predetermined. Nothing is left to the discretion of the manager or the governing board.

Most North Carolina jurisdictions that offer a longevity pay bonus pay it out once a year, although they could pay it out more frequently if they chose. ***The FLSA regulations instruct us at 29 CFR § 778.209(a) that under these circumstances, where calculation and payment of the bonus is deferred over a period of time longer than a workweek, "the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained . . . ."***

When the fact that employees have earned the longevity pay bonus (by staying employed with the employer until the payout date) is clear and the amount of the bonus may be credited to them, the longevity pay "must be apportioned back over the workweeks of the period during which it may be said to have been earned." This means that the **employer must retrospectively recalculate the regular rate and make up the difference between what the employer actually received and what the employee would have received if the regular rate had included the pro-rata amount of longevity pay in those weeks that the employee worked overtime during** the preceding year.

Calculating Longevity Rate of Pay

Calculating the back overtime pay that is due once longevity pay has been awarded is not actually that difficult if you follow DOL's instructions at **29 CFR § 778.209(b)**.

1. ***First, add together all of the hours, both straight-time and overtime, that the employee worked during the year covered by the longevity payment.***
    - If you pay longevity out in the last week or last pay period of the longevity year, you won't know how many total hours the employee has worked in the year because it is possible that the employee will be needed to work overtime before this end-of-the-year week is through. In this case, you will probably have to wait until the next payday after the week in which the longevity is paid out to calculate the additional overtime.
    - If you wait until after the end of the year to pay out the longevity pay, you will have no problem in calculating the total number of hours.

2. ***Once you have determined the total number of hours that an employee has worked in the year covered by the longevity payment, divide the total amount of the longevity payment by that number. This is the longevity rate of pay***.

3. ***Now multiply the total number of overtime hours worked in the year by ½ of the longevity rate of pay. The result is the longevity overtime differential payout amount owed to the employee.***

You may be wondering why the multiplier is only ½ of the longevity rate of pay and not 1 ½ times the rate. That is because the calculation of the longevity rate of pay has already taken into account all of the straight hours worked (the "time" in "time-and-one-half").

Let's look at an example. Remember our old friend **Paramedic Joe**, from our previous discussion of how to calculate the regular rate. In that example, Paramedic Joe worked four hours of

overtime. Let's assume he works four hours of overtime each week. He had an hourly rate of pay of $10. In addition to this he received $55 each week as a bonus for being on-call two nights per week. We calculated his regular rate to be $11.25 per hour, which meant that his four hours of overtime were paid at an overtime rate of $16.86. He earned a total of $67.50 in overtime pay, in addition to his straight-time pay of $400.00 and his $55 on-call bonus.

This year, Joe earns a longevity bonus of $2,000. Joe works 4 hours of overtime each week. He is something of a superman and has never take a day of vacation or sick leave this year. That means that Joe has worked 40 hours of straight time and 4 hours of overtime each of the 52 weeks of the year. ***That's 2,080 hours of straight time and 208 hours of overtime. When you add all of his hours together, it turns out that Joe has worked a total of 2,288 hours*** – straight-time and overtime combined – during the period represented by the longevity payment. Next, we ***divide the $2,000 longevity payment by Joe's 2,288 hours of work to get a longevity rate of pay of $0.88*** (yes, that's right, 88 cents). Finally, we ***multiply Joe's 208 hours of overtime by half of the longevity rate of pay, or $.44. His employer owes Joe $91.52*** to make up for the fact that longevity pay should have been included in his regular rate.

40 x 52 = 2,080

4 x 52 = 208

2,080 + 208 = 2,288 hours worked

$2,000 longevity pay ÷ 2,288 hours worked = $.88 as the longevity rate of pay

$.44 (half of the longevity rate) x 208 hours of overtime = $91.52

Remember Joe's colleague Drake, the HR Guru? He too earns longevity pay. He's been around longer than Joe and is paid $2600 in longevity pay. The same formula applies to Drake, a ***salaried nonexempt employee*** as does to Joe, an hourly nonexempt employee. Drake has worked a total of 1900 hours of straight time this year and has worked 12 hours of overtime each month. That's all you need to know to figure out how much his employer owes him to make up for the fact that longevity pay was not included in his regular rate. I'll give you the answer: Drake's employer owes him $92.16. Can you apply the formula and get the correct amount?

And while it is tedious to do this by hand, I'm pretty sure you can program your payroll systems to do the calculations automatically and put you in strict compliance with the FLSA! Yay!

A cautionary note: At 29 CFR § 778.209(a), the FLSA regulations provide that bonuses that cannot be identified with a particular week's work may be divided into equal amounts of bonus for each of the weeks that to which the bonus relates. At first blush, it would therefore seem appropriate to divide the amount of the longevity pay bonus into 52 equal parts, representing the 52 weeks of the year for which the longevity pay is awarded. I know that is how I first approached the problem. **Do not do this.** The amount of longevity pay is not tied to hours work or weeks worked so this method of calculating the regular rate is not correct.