

What CPAs should know about FairPay and overtime - Overview

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Note: the purpose of this article is to provide practical and useful guidance about the topic, and not to provide specific accounting, legal or other professional service for your business. For information for your business, you should consult with a qualified professional.

One of the biggest myths in business today is that if you pay someone a salary, you don't have to pay the person overtime. That's just not true, and as some employers are finding out, not knowing the rules can result in stiff penalties in addition to back pay. In recent regulatory changes, called FairPay by the US Department of Labor, the requirements are clarified.

What's new?

FairPay became effective August 23rd 2004 and affects employers in several ways:

- Most exempt workers have to earn at least \$455 salary per week to remain exempt.
- The definition of salary has been updated to conform to modern practices, but is quite rigid in that you can't pay exempt employees in a way that effectively turns them into hourly workers.
- The descriptions of the exempt labor classifications has been updated to conform to today's jobs. In addition, many workers become exempt under FairPay.

The court case, Cortez v. Medinas's Landscaping is important to all employers. In this case, workers were awarded overtime even though the statute of limitations had passed, because the employer had failed to post the overtime regulations as required by law.

So what's the rule?

The requirement to pay overtime is defined in the Fair Labor Standards Act (FLSA), which says you must pay overtime to any employee who works over 40 hours in the work week unless the employee works in a job that is specifically *exempt* from the law. There are five groups of employees who are exempt from wage and hour laws:

- Executive employees.
- Professional employees: learned professionals and creative professionals.
- Administrative employees.
- Outside salespeople.
- Computer professionals.

Everybody else is non-exempt and has to be paid overtime and receive the other protections of the wage and hour laws.



The titles we use and the importance we place on employees' job roles can help us walk into a trap. Take group leaders. They're valuable employees, who may attend management meetings. However, these employees often do not truly supervise two or more full-time employees or fit within any of the exemptions and thus may fail to meet the requirements to be considered exempt from overtime.

Executive exemption

An executive must be paid a salary of at least \$455 per week and meet the following criteria:

- Primary duty to manage a company, branch or division or department.
- Regularly directs the work of two or more full-time employees, or equivalent.
- Has authority to hire or fire or recommend hiring, firing, promotion, or similar actions.
- Regularly exercises independent judgment and discretion.

Professional exemption

A professional employee is one who is paid a salary of at least \$455 a week and:

- Performs work requiring advanced knowledge or does original and creative artistic work or teaches in an educational institution.
- Regularly exercises independent judgment and discretion.
- Does work that is intellectual and varied and where the output rate can't be standardized.

Administrative exemption

An administrative employee is one who is paid a salary of at least \$455 per week and:

- Does office or non-manual work to implement management policies or the company's general business operations.
- Regularly exercises discretion and independent judgment.
- Is either an executive or administrative assistant to a top executive or a staff employee with specialized skills who does specialized work under only general supervision.



NOTE Job titles can be misleading. Some secretaries who do mainly secretarial work are called *administrative assistants*, but that doesn't turn them into exempt employees unless they meet the requirements for the exemption.

Outside salespersons exemption

An outside salesperson is one who regularly works away from the employer's office:

- Making sales.
- Obtaining orders or contracts.

Computer professional exemption

Computer systems professionals fall into a gray exemption area. Those who work at highly skilled jobs with computer software are normally exempt, while those who work operating or repairing hardware are normally not exempt. A computer professional who earns at least \$27.63 per hour is normally exempt.

What's a salary payment?

Each exemption category requires the employee be paid a salary. This means receiving the full regular pay for the week even if the employee works less than a full work week. If you dock the pay of an exempt worker, you endanger the employee's classification unless the deduction is permitted under FLSA. Normally, this is if the employee:

- Is absent for a day or more due to personal reasons other than illness.
- Is absent due to illness and receives sick pay instead of salary.
- Takes Family and Medical Leave Act leave.

What about comp time?

That depends on whether the employee is exempt or nonexempt:

- **Nonexempt.** Comp time is only allowed within the pay week for nonexempt workers. Say an employee works 2 OT hours on Monday. You can give the employee two hours off on Friday to make up for it, otherwise, you owe the employee 2 OT hours on payday. You *can* pay the overtime and put it in an OT bank for the employee to be drawn out later for a paid absence such as extra vacation or personal time.
- **Exempt.** The employer doesn't *have* to provide comp time for exempt workers, but is allowed to. These employees can bank their overtime and take it at a later time

I pay my employees plenty already!

Let's say you're paying your employees a wage that's high enough to cover any OT they have to work. Shouldn't that be enough? Nope! The law says you still have to pay the OT on top of the already high wage you pay. The best thing to do is restructure the pay scale, reduce the straight time wage and start paying OT

So what should you do?

Start by paying OT to hourly employees if they earn it. There's no excuse not to do this because there's no way they can be exempt. Or, you could find a way to pay them by salary and classify them exempt.

Next, look at job classifications for salaried employees to whom you don't pay OT. They have to fit into one of the four categories listed above. If not, pay the OT or restructure the job.

Finally, make sure you've posted the necessary government posters. They've been revised after August 23rd.

Want more information?

Check the Department of Labor Web site. Two topics are sure to interest you:

Home page: www.dol.gov/

Employers page: www.dol.gov/dol/audience/aud-employers.htm

We also suggest your company attorney, or ask one of our staff for help.