



Overtime Compensation

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

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Overtime Compensation

Reference Number: MTAS-944

The FLSA (29 U.S.C. §§ 206 and 207) requires payment of prescribed wages, including overtime compensation, in either cash or check or similar medium. Overtime compensation must be at time and a half the employee's regular rate of pay. The statute allows payment to include the "reasonable cost" or "fair value" of furnishing for an employee with board, lodging or other facilities. 29 C.F.R. § 778.116.

Compensation for Hours Worked

Reference Number: MTAS-1527

The FLSA does not limit the number of hours that an employee may work, either daily or weekly. It simply requires that overtime pay must be paid at a rate of not less than one and one-half (1½) times the non-exempt employee's regular rate of pay for each hour worked in a work week in excess of the maximum hours applicable to the type of employment in which the non-exempt worker is engaged. This usually means overtime for hours in excess of 40 hour per week. Of course, overtime payments need not be made to exempt or non-covered workers. Only non-exempt employees are entitled to overtime under the act.

"The FLSA's workweek for nonexempt employees is generally a fixed period of 168 hours — seven consecutive 24-hour periods" which is established by the employer for each employee. 29 C.F.R. § 778.105. It may begin on any day of the week and at any hour of the day; it need not coincide with the calendar week. "The FLSA also provides for the declaration of a longer work period for law enforcement and fire protection personnel." 29 C.F.R. § 553.224(a). For the purpose of FLSA compliance, "work period" and "workweek" are identical, with the exception being for public safety.

In computing hours worked, "the FLSA requires that each workweek stand alone." 29 C.F.R. § 778.104. **It does not permit the averaging of hours over two or more weeks, with the exception of police, firefighters,** and certain hospital and nursing home employees. This is true regardless of whether an employee works on a standard or swing-shift schedule and regardless of whether he or she is paid daily, weekly, bi-monthly, or on another basis.

While overtime must be calculated on a work week basis, there is no requirement in the FLSA that overtime compensation must be paid weekly. According to the DOL regulations, as a general rule, "overtime earned in a particular workweek should be paid where possible on the regular payday for the period in which such workweek ends." However, when the correct amount of overtime compensation cannot be determined until later, it is permissible to wait if it is paid as soon after the regular pay period as is practical. Payment should not be delayed beyond the next payday. 29 C.F.R. § 778.106.

Occasional and Sporadic Employment

Reference Number: MTAS-966

When state or local government employees, at their option, work occasionally or sporadically on a part-time basis for the same agency in a capacity different from their regular employment, the hours worked in the different job do not have to be combined with the regular hours for the purpose of determining overtime liability." 29 C.F.R. § 553.30(a). DOL defines "occasional or sporadic as infrequent, irregular or occurring in scattered instances." 29 C.F.R. 553.30(b)(1). DOL has determined (29 C.F.R. § 553.30(c)(1)) that hours worked "will be excluded only where the occasional or sporadic assignment is not within the same general occupational category as the employee's regular work." Moreover, "the decision to work in a different capacity must be made freely by the employee and without concern, implicit or explicit, by the employer." 29 C.F.R. § 553.30(b)(2). The employee must be free to refuse to perform the work without fear of sanctions and without being required to explain or justify the decision.

The fact that the activity is recurring, such as at a county fair where a county employee takes tickets or provides security, does not necessarily mean that the activity will not meet the "occasional or sporadic"

test. Employment in such activities may be considered occasional or sporadic for regular employees of state and local governments even though the need can be anticipated seasonally. It is important to note that “regular part-time jobs, where the employee works scheduled hours, will not qualify under the occasional and sporadic provisions. Moreover, performance of work similar to work regularly performed, even after regular working hours, will not qualify. In such cases, the hours worked in both jobs must be aggregated and overtime calculated.” 29 C.F.R. § 553.30(b)(3)

Substitutions

Reference Number: MTAS-1528

The FLSA provides that any individual employed in any capacity by a public agency may agree to substitute, during scheduled work hours, for another employee. Rule 29 U.S.C. § 207(p)(3) and 29 C.F.R. § 553.31(a) provides that employees may work substitution schedules where the substitution is:

1. Voluntarily undertaken and agreed to solely by the employees, and
2. Approved by the employer.

The traded time is not considered by the public agency in calculating the hours for which the employee is entitled to overtime compensation. 29 C.F.R. § 553.31(a). In effect, even though a substitution is made, “each employee will be considered to have worked his/her normal schedule.” 29 U.S.C. § 207(p)(3). In addition, “the employer of the employee who performs such substitution work is not required to keep a record of the hours of substituted work.” 29 U.S.C. § 211(c); 29 C.F.R. § 553.31(c).

Regular Rate of Pay

Reference Number: MTAS-945

The FLSA defines “regular rate of pay” as the total of all payments made by the employer to, or on behalf of, an employee. The regular rate of pay may be more than the minimum wage, but it cannot be less.” 29 C.F.R. § 778.107. Following are examples of compensation paid to non-exempt employees that are included in determining the regular rate of pay. 29 C.F.R. § 778 Subpart C:

1. On-call pay. 29 C.F.R. § 778.223.
2. Non-Discretionally Bonuses promised for accuracy of work, good attendance, continuation of the employment relationship, incentive, production and quality of work. 29 C.F.R. § 778.208.
3. Contest prizes. 29 C.F.R. § 778.330.
4. Employee lunch or meal expenses paid by the employer (29 C.F.R. § 778.217(d)), unless the expense is incurred on the employer’s behalf or for the employer’s benefit (for example, supper money while working late or meal expenses while out of town on business. 29 C.F.R. § 778.217(b).
5. Salaries. 29 C.F.R. § 778.108.
6. Salary increases, including retroactive increases. 29 C.F.R. § 578.108.
7. Shift differentials, hazardous-duty pay and longevity pay. *Featsent v. City of Youngstown*, 859 F. Supp. 1134 (N.D. 1993).
8. Traveling expenses of employees going to and from work, if they are paid by the employer (29 C.F.R. § 778.217(d)), unless the expenses are incurred on the employer’s behalf or for the employer’s benefit (for example, travel expenses due to temporary movement of the work location or expenses for traveling “over the road”). 29 C.F.R. § 217(b).

Additionally, compensation to employees may take the form of employer contributions to employee flexible benefit plans, which are known also as “cafeteria” plans. Cafeteria plans are governed by Section 125 of the Internal Revenue Code. The question of whether cafeteria plan benefits must be included in an employee’s regular rate was addressed in the case of *Madison v. Resources for Human Development Inc.*, Civil Action No. 97-7402 (E.D. Pa. Jan. 8, 1999). In the case, the court ruled that “certain employer contributions to the workers’ cafeteria plans should have been included in the employee’s regular rates.” Principally, this was because the employees were given the choice to receive

the employer's contributions, in whole or in part, in cash. Under FLSA rules (29 C.F.R. § 778.215(a)(5)), "such cash components to benefit plans, including cafeteria plans, are permitted only in limited circumstances," none of which existed in Madison.

Following are examples of payments that need *not* be included in the regular rate of pay:

1. Absence pay for infrequent or unpredictable absences, such as vacation, illness, bereavement, disaster relief payments or jury leave. 29 C.F.R. § 778.218.
2. Discretionary bonuses. 29 C.F.R. § 778.211.
3. Holiday pay, if it is equivalent to regular earnings. 29 C.F.R. §§ 778.203(d), 778.218.
4. Premium pay, such as time compensated at time and one-half. 29 C.F.R. § 778.201(a).
5. Idle time beyond the control of the employer due to machinery breakdown, supplies failing to arrive and weather conditions making it impossible to work. 29 C.F.R. § 778.218(c).
6. Severance pay. 29 C.F.R. § 778.224.
7. Pension, profit-sharing, thrift and savings plan payments qualifying under the U.S. Department of Labor's administrative regulations. 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 549.0(a)&(b), 778.213.
8. Call back premium pay. 29 C.F.R. § 778.221.
9. Travel expenses, if business trips are taken by the employee. 29 U.S.C. § 207(e)(2).
10. Show-up or reporting pay (paying a minimum amount for coming to work) to the extent pay exceeded hours worked. 29 C.F.R. § 778.220.
11. Weekly overtime pay, in any amount. 29 C.F.R. § 778.201.
12. Health and welfare fund benefits received by the employee. 29 C.F.R. § 778.215.
13. Death benefits. 29 C.F.R. § 778.218.
14. Employer-paid disability benefits, hospitalization, medical care, retirement benefits, workers' compensation, or other employer-paid health and welfare contributions, including all insurance premiums. 29 C.F.R. § 778.214.
15. Reasonable uniform allowances. 29 C.F.R. § 217(b)(2).
16. Payment made to an employee for periods of absence due to the use of accrued compensatory time. 29 C.F.R. § 553.26(c).
17. Tuition reimbursement. Wage and Hour Opinion Letter, Sept. 17, 1993.
18. Automobile reimbursement. Wage and Hour Opinion Letter, Dec. 12, 1988.

Chapter 32 of the DOL Field Operations Handbook identifies other forms of pay that may be excluded from the computation of the regular rate of pay, including sums paid as gifts, payments for suggestions, new business contest awards, fringe benefits paid in cash, report and call-back pay, reimbursement of employee expenses, and the employer's share of board and lodging cost.

Wage Deductions

Reference Number: MTAS-946

In most cases "the FLSA does not prohibit deductions from wage payments; however, the regular rates and overtime pay must be figured before deductions are made." 29 C.F.R. § 778.305. In other words, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before deductions are made. Deductions may be made to wages for the employee's share of Social Security and unemployment insurance, as well as other federal, state or local taxes, levies or assessments without affecting the minimum wage rate. 29 C.F.R. § 531.38. No deduction can be made for any tax that the law requires be borne by the employer.

If wearing a uniform is required by law or by the employer, the cost of the uniform is considered to be a business expense of the employer. "If the employer requires the employee to bear the cost, then the employer may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the act." W.H. Publication 1428 (Rev. March 1984). If the purchase of a

uniform by an employee cuts into the minimum wage or overtime compensation required by the FLSA, the employee must be reimbursed no later than the next regular payday. As long as the employer is continuing to pay in excess of the minimum wage, the employer may prorate deductions for uniforms over a period of paydays.

Following are examples of wage deductions that are to be included in the regular rate.

1. Meals, lodging, and other facilities. 29 C.F.R. 531.29. and 29 C.F.R. 531.33.
2. Voluntary wage assignment by the employee. 29 C.F.R. 531.40(c).
3. Charitable contributions by the employee.
4. Garnishments Health and welfare plan contributions by the employee. 29 C.F.R. 531.39.
5. Insurance premium advances paid for the employee's convenience.
6. Pension plan contributions by the employee.
7. Re-payment of salary advances.
8. Savings plan contributions by the employee.
9. Withholding of taxes for or on behalf of the employee, including state and federal income tax, Social Security and unemployment compensation.
10. Union dues and fees authorized by the employee. 29 C.F.R. 531.40(c).
11. U.S. savings bond purchases. C.F.R. § 778.304.

Computing Regular Rate of Pay

Reference Number: MTAS-1529

There are various methods of computing an employee's regular rate of pay. The regular rate is a rate per hour. The regulations provide guidance on computing regular rates of pay for (1) hourly employees, (2) hourly rate and bonus employees, (3) salaried employees working a fixed workweek of 40 hours, (4) salaried employees paid for all hours worked but working more than 40 hours in a workweek, (5) salaried employees working a fixed workweek of less than 40 hours, (6) a fixed weekly salary for a fixed workweek of more than 40 hours, (7) semimonthly salary pay, (8) monthly salary pay, (9) irregular hours, (10) piecework, (11) day rate and job rates, (12) an employee working at two or more rates, (13) payments other than cash, and (14) overtime based on authorized basic rates. 29 C.F.R. § 778.109.

Hourly Employee

Reference Number: MTAS-2087

Computing Regular Rate of Pay - Hourly Employee

The regular rate for an hourly employee is the hourly rate plus any other form of compensation received by the employee, such as non-discretionary bonuses, shift premiums, etc. For all hours over 40 worked in a week, the employee must be paid at least one and a half (1½) times the regular rate. 29 C.F.R. § 778.110(a).

Example:

An employee is paid \$8 per hour. The employee would be paid \$12 for each hour worked during the workweek over 40: ($\$8 \times 1.5 = \12). In other words, the employee is entitled to be paid an amount equal to \$8 an hour for 40 hours and \$12 an hour for any hours over 40.

Hourly Rate and Bonus

Reference Number: MTAS-2088

Computing Regular Rate of Pay - Hourly Rate and Bonus

An employee paid an hourly rate plus a bonus would be paid a regular rate of pay based on the example below. 29 C.F.R. § 778.110(b).

Example:

An employee works 46 hours in a workweek and receives a bonus of \$19.20 in addition to earnings at an hourly rate of \$7.25 per hour. The regular rate would be \$7.67 per hour. This is computed as $46 \text{ hours} \times \$7.25 = \$333.50 + 19.20 \text{ bonus} = \352.70 . This total divided by 46 hours yields a regular rate of \$7.67. The employee would be entitled to receive a total wage of \$375.86: $(46 \text{ hours} \times \$7.67) + (6 \text{ hours} \times \$3.84) = \$352.82 + 23.04 = \375.86 .

Salaried Employee - Fixed Work Week

Reference Number: MTAS-2089

Computing Regular Rate of Pay - Salaried Employee Working a Fixed Workweek of 40 Hours

If an employee is employed solely on a weekly salary basis, the regular rate is determined by dividing the salary by the number of hours that the salary is intended to cover. 29 C.F.R. § 778.113(a).

Example:

If an employee is paid a salary of \$400 a week to work 40 hours, the regular rate of pay is \$10 an hour. If the employee works 48 hours in one week, the employee is entitled to an overtime premium of \$15 per hour, which amounts to \$120 ($8 \text{ hours} \times \$15 = \120).

Salaried Employee - More than 40 Hour Work Week

Reference Number: MTAS-2090

Computing Regular Rate of Pay - Salaried Employee Working More Than 40 Hours a Week

If an employee receives a salary for all hours worked, then the regular rate varies according to the number of hours worked in a week. The employee's regular rate is determined by dividing the weekly salary and other forms of compensation by the number of hours worked. 29 C.F.R. § 778.114.

Example:

If an employee works 50 hours for a weekly salary of \$500, the regular rate is \$10 an hour. Overtime for this employee is based on half-time and would be \$5 an hour for 10 hours, which is \$50. The regular rate of an employee who is paid a salary for all hours worked varies each week depending on the hours actually worked.

Salaried Employee - Less than 40 Hour Work Week

Reference Number: MTAS-2091

Computing Regular Rate of Pay - Salaried Employee Working a Fixed Workweek of Less Than 40 Hours

The regular rate for an employee working a fixed workweek of less than 40 hours can be determined in one of two ways depending on the understanding between the employer and the employee. The conventional method is to divide the fixed weekly wage and other forms of compensation by the number of hours in the workweek. 29 C.F.R. § 778.114.

Example:

An employee works a 35-hour workweek for a salary of \$300. Under the act, the employee's maximum straight-time workweek is 40 hours. The employee's regular rate is \$8.57 per hour (\$300 divided by 35 hours). If the employee works overtime, he is entitled to \$8.57 per hour for hours 36 through 40 and \$12.86 ($\$8.57 \times 1\frac{1}{2}$) for each additional hour over 40.

The other method of calculating the regular rate for workweeks of less than 40 hours depends on an agreement between the employer and the employee that the salary paid an employee represents compensation for all hours worked up to 40 per week. Then, the employee can work any amount of time up to 40 hours per week without additional compensation. The rate of pay also would be based upon a 40-hour work week and not the lesser workweek actually labored.

Fixed Weekly Salary - More than 40 Hour Work Week

Reference Number: MTAS-2092

Computing Regular Rate of Pay - Fixed Weekly Salary For a Fixed Workweek of More Than 40 Hours

The regular rate for an employee working a fixed workweek of more than 40 hours is half-time for hours regularly worked over 40 and time and one half for additional hours. 29 C.F.R. § 778.114(b)

Example:

An employee is paid \$480 for a 48-hour week. The applicable statutory straight-time workweek is 40 hours. The employee's rate is \$10 per hour ($\$480 \div 48 \text{ hours} = \10). The weekly wage is \$520, calculated as: $\$480 + [(\frac{1}{2} \times \$10) \times (48-40)]$. For hours worked over 48, the employee must be paid time and a half, or \$15 per hour, and is not eligible for half-time pay since the salary did not represent payment for hours worked in excess of 48 per week.

Semimonthly Salary Pay

Reference Number:

MTAS-2093

Computing Regular Rate of Pay - Semimonthly Salary Pay

The regular rate for an employee paid a semi-monthly salary is computed by breaking the salary into weekly portions. Thus, the salary is multiplied by 24 (the number of semi-monthly periods in the year) and divided by 52 (the number of weeks in a year). To find the regular rate, divide the weekly salary by the number of hours in a workweek. 29 C.F.R. § 778.113(b).

Example:

If an employee earns \$700 semi-monthly and works 40 hours per week, the employee's regular rate is \$8.08: $(\$700 \times 24)/52 = \323.08 weekly rate; $\$323.08/40 = \8.08 hourly rate.

Monthly Salary Pay

Reference Number: MTAS-2094

Computing Regular Rate of Pay - Monthly Salary Pay

To compute the regular rate for an employee who is paid monthly, the employee's salary must be multiplied by 12 (the number of months in the year) and divided by 52 (the number of weeks in the year). This figure must then be divided by the number of hours in a workweek. 29 C.F.R. § 778.113(b)

Example:

If an employee earns \$1,500 a month and has a statutory straight-time workweek of 40 hours, the employee's regular rate would be \$8.65: $(\$1,500 \times 12)/52 = \346.15 per week; $\$346.15/40 = \8.65 hourly rate. If the employee worked 44 hours in a workweek, the employee would be entitled to overtime pay for four hours at time and a half: $(\$8.65/2 = \4.33 ; $4.33 + 8.65 = \$12.98$ overtime rate), $4 \times \$12.98 = \51.92 . The employee's salary for the month would be \$1,551.92. The employee also might be eligible for half-time treatment if his salary represented all hours worked.

Employee Working at Two or More Rates

Reference Number: MTAS-2096

Computing Regular Rate of Pay - Employee Working at Two or More Rates

When, in a single workweek, an employee performs two or more different types of work for which different straight-time rates have been established, the employee's regular rate for that week can be calculated as the weighted average of such rates. The weighted average is the earnings from all such rates added together, and the total is divided by the total number of hours worked at all jobs. 29 C.F.R. § 778.115.

Example: Employee works two jobs (Admin Asst and Janitor). Employee earns \$15/hr as Admin Asst for 40 hours of work. The employee earns \$9/hr as Janitor for 8 hours week. Total hours worked during workweek is 48. Under the weighted average method, earnings from the Admin. Asst position ($40 \times \$15.00 = \600) is added to earning from the Janitor job ($8 \times \$9.00 = 72.00$) to get a total of \$672.00. The total is divided by the total hours worked (48 hours) to arrive at the weighted average regular rate of pay of \$14.00 per hours.

The earnings total of \$672.00 represents the straight-time pay earned for the 48 hours worked, so only half-time pay for the 8 overtime hours is needed to assure that the required time and a half is paid for overtime hours worked. Half-time for the weighted average regular rate is \$7.00 per hour ($\$14.00 \div 2$), which must be multiplied by the 8 overtime hours ($\$7.00 \times 8 = \56.00) and added to the straight-time pay to get the total pay for the workweek. Therefore, using the weighted average method, total pay for the workweek would be \$728.00 ($56.00 + \672.00).

Irregular Hours

Reference Number: MTAS-2095

Computing Regular Rate of Pay - Irregular Hours

The regular rate for an employee who works irregular hours but is paid a salary on a fixed monthly basis is computed by converting the wages into weekly figures. The regular rate is computed for each week by dividing the weekly wage by the hours actually worked in a week. Overtime must be paid each week without offsetting it from other weeks in which fewer than 40 hours were worked unless the employer is proceeding under the 207(k) exemption for public safety officers or the 207(j) provision for hospitals and nursing homes. 29 C.F.R. § 778.114(b).

Example:

An employee is paid a monthly salary that in February translates to a weekly salary of \$500. However, the employee works irregular hours. In week one, the employee works 40 hours. No overtime is due and the employee is paid \$500. In week two, the employee works 50 hours. The employee's regular rate for week two is \$10 (\$500 divided by 50), and he is entitled to a \$50 half-time overtime premium ($\$10 \times \frac{1}{2} \times 10$). The employee's total compensation for week two equals \$550. In week three, the employee works 40 hours and is entitled to no overtime. In week four, the employee works 48 hours, resulting in a regular rate of \$10.41 per hour (\$500 divided by 48). The employee is entitled to a half-time overtime premium of \$41.64 ($\$10.41 \times \frac{1}{2} \times 8$). The employee's total compensation for week four is \$541.64. The employee's salary plus overtime premiums for the month total \$2,091.64.

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