

# Sweet Dreams: Don't Let Overtime Exemption Issues Become Nightmares

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How are you sleeping? Health professionals are increasingly touting the benefits of a good night's sleep for optimal health. Are you sleeping like a baby, secure in the knowledge that your company has carefully analyzed the overtime status of its employees under Oregon law and the federal Fair Labor Standards Act ("FLSA")? Or are you tossing and turning, concerned that with every paycheck issued, your company may be exposing itself to liability for unpaid overtime, penalties and damages, and attorneys' fees? If so, keep reading, and you'll be sleeping through the night in no time.

## Background

The FLSA generally requires employers to pay a minimum wage (currently \$7.50 an hour) for all hours worked, as well as overtime pay at time and one-half the employee's regular rate of pay for all hours worked in excess of 40 in a workweek. Oregon law imposes similar, but not identical, requirements. Effective July 1, 2016, depending on where your employees work, the Oregon minimum wage currently ranges from \$9.50 to \$9.75 per hour. The minimum will increase annually and will eventually reach a maximum range of \$12.50 to \$14.75 an hour, with subsequent increases based on increases to the Consumer Price Index.

In addition to establishing a minimum wage, Oregon law and the FLSA also require covered employers to pay overtime wages at time and one-half the employee's regular rate of pay for all hours worked over 40 in a workweek. Like the minimum wage requirements, the overtime rules apply unless the employee is "exempt"; non-exempt employees are subject to the overtime rules and must be paid accordingly for hours worked beyond 40 in a workweek.

## Who's Exempt?

Both Oregon law and the FLSA provide certain exemptions from the overtime requirements. Most common are the so-called "white collar" exemptions: the executive, administrative, and professional

exemptions. The white collar exemptions are not identical under Oregon law and the FLSA, but they are similar. To be exempt under one of the white collar exemptions, an employee must satisfy a duties test, a salary threshold test, and a salary basis test.

The “salary basis” test requires that exempt employees be paid a fixed amount per pay period, and the amount is not subject to variance due to the quality or quantity of work produced. While both Oregon and federal law provide a limited number of specific exceptions, employers generally may not make deductions from an exempt employee’s salary without putting the overtime exemption at risk. Ordinarily, except for permissible deductions, or additions such as bonuses or commissions, one would expect to see an identical amount of gross wages on an exempt employee’s pay check from pay period to pay period.

The “salary threshold” test imposes a minimum salary requirement. Under Oregon law, the minimum salary is simply 40 times the minimum wage. Since 2004, the FLSA minimum salary has been \$455 per week (\$23,660 annually). However, that number is about to increase—substantially. Effective December 1, 2016, the minimum salary for an exempt “white collar” employee will be \$913 a week (\$47,476 annually). Regardless of their duties, “white collar” employees generally will be non-exempt if they earn less than \$913 per week.

In determining whether an employee satisfies the minimum salary after December 1, 2016, the FLSA will allow employers to count non-discretionary bonuses and “catch up” payments once a quarter. However, the salary threshold must be paid “exclusive of board, lodging, or other facilities.” Consequently, the cost or market value of housing provided to a manager may not count toward the \$913 weekly minimum salary.

If an employee satisfies the “salary basis” and “salary threshold” tests, then the employee will be exempt from FLSA and Oregon overtime if the employee also meets the duties test for the particular “white collar” exemption at issue, whether it is the executive, administrative, or professional exemption. While an examination of the duties test is beyond the scope of the article, employers should remain mindful of a couple of points with respect to overtime exemptions. First, overtime exemptions are narrowly construed in favor of employees. Along the same lines, an employer always has the burden of proof when it comes to proving that a particular employee meets the salary and duties tests sufficient to qualify as exempt. Finally, while a good job description is useful, the employee’s actual day-to-day duties will determine whether an overtime exemption applies.

## Final Thoughts

Because of the litigation risks, employers confronted with close exemption situations simply may elect to treat the employee as non-exempt and pay overtime for hours worked over 40 in a workweek. It may also make sense in close cases to require the employees to record their hours to avoid inflated claims in litigation. In any event, employers should always thoroughly evaluate the employees they treat as exempt; be in a position to prove that an overtime exemption applies; and do not forget about the increased salary threshold requirements effective December 1, 2016. Do these things and the quality of your sleep is sure to improve.

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