

WAGE AND HOUR FOR HEALTH CARE EMPLOYERS – 30 COMMON QUESTIONS

Note: This article directed toward health care employers. Although much of it will be of interest to other employers as well, its application to other kinds of employers may be different than what is stated in this article. Furthermore, this article is based on the federal Fair Labor Standards Act. State wage and hour law, if any, also must always be consulted. It is possible state law will require a different answer than what is stated in this article.

The Wage and Hour Division of the United States Department of Labor has expanded its enforcement efforts to assure compliance by health care employers with minimum wage and overtime pay laws. Health care employers will be audited for compliance even though no employee has complained and is now *much more* likely to be the subject of an investigation than in the past.

Because health care employers, including home care agencies (perhaps, especially home care agencies), are now targeted by the government, this article will provide a brief overview of the law's requirements. Recognize, however, that even a summary of the various rules applicable to calculating minimum wage and overtime pay is beyond the scope of an article such as this. Rather, this article is simply to identify some of the more common mistakes made by health care employers concerning minimum wage and overtime pay issues.

Coverage

The federal law addressing overtime pay and minimum wage for most employers is the Fair Labor Standards Act (the "FLSA"). Whether or not a particular employer or employee is covered by the FLSA can become rather complex. If an employer does not know whether it or its employees are covered, it should obtain legal advice applicable to its specific situation. In most instances, however, the following is an accurate, general summary of whether a health care employer is covered by the FLSA:

(1) Subject to (2) and (3), below, an employer is covered if it has an annual gross volume of \$500,000. This would be the test for health care employers such as freestanding home care agencies or hospices, physician offices, laboratories, and DME suppliers.

(2) If the employer is a hospital or nursing home, it is covered irrespective of its annual gross volume. A freestanding employer which is a subsidiary or sister corporation of a

hospital or nursing home also may be viewed as part of the hospital or nursing home operation for coverage purposes unless it is operated quite independently.

(3) If the employer is a state or local public employer (e.g., a county health department), it is covered irrespective of its annual gross volume.

Requirements

Under the FLSA, generally, an employer must pay its covered employees a minimum wage per hour worked and at a rate of one and one-half times the employee's regular rate for hours worked in excess of 40 hours in a workweek. A special rule exists for hospitals, nursing homes and certain other residential facilities which permits overtime to be paid for hours worked over eight in a day or over 80 in a 14 day period (this is known as the "8 and 80" rule and is discussed later in this article).

Failure to pay minimum wage and overtime pay as required can result in significant liability for not only the unpaid wages, but for substantial penalties and the employee's attorneys fees as well. It is not uncommon for minimum wage and overtime pay violations to involve tens of thousands of dollars of liability.

The minimum wage under the FLSA is currently \$7.25 per hour.

Every employer with employees subject to the FLSA must post a notice explaining the law in a conspicuous place at all of the employer's locations so employees can read it. The content of the notice is prescribed by the Wage and Hour Division of the United States Department of Labor. A poster containing this information can be obtained through Wage and Hour Division offices or downloaded from the Wage and Hour Division's web site – go to www.dol.gov/whd/.

30 Common Questions

Certain misunderstandings and questions seem to occur over and over among health care employers concerning their wage and hour obligations. This article will provide brief answers to many of the more common wage and hour questions in health care. It will be somewhat conclusory in order to simply let the reader know the answers. If further explanation or guidance is needed, legal advice applicable to your own specific situation should be obtained.

(1) Can employees waive their right to minimum wage and overtime pay?

No. A covered employee is legally entitled to minimum wage and overtime pay calculated in accordance with the federal Fair Labor Standards Act (FLSA). The employee does not have the power to waive those requirements.

If an employer is not paying minimum wage or overtime pay because it believes its employees have waived their right to such pay, it is mistaken and could have significant back-pay liability.

(2) When is an employee exempt from minimum wage and overtime pay?

An employee is entitled to minimum wage or overtime pay unless the employee falls within one of the specific exemptions set forth in the FLSA. The FLSA contains numerous exemptions which apply to various types of employees. The exemptions which are particularly important for all health care employers are the so-called “white collar” exemptions for executive, administrative and professional employees. Two other white collar exemptions which can be helpful are those for outside salesmen and for computer related occupations. In home care, another exemption, known as the “companionship services exemption,” for employees providing companionship services to the aged or infirm often can come into play.

Specific legal requirements exist for each of these exemptions. Depending upon the exemption involved, the requirements include a combination of factors, such as: the employee’s duties and the amount of salary or fees paid to the employee each workweek. Educational background is particularly significant for the professional exemption. For the executive exemption the employee must be paid on a salary basis. For the administrative and professional exemptions, the employee must be paid on either a salary basis or a fee basis. The method of pay is not a part of the outside salesman exemption or the companionship services exemption. The computer related occupation permits payment on either a salary or an hourly basis provided certain dollar amounts are met.

All of the requirements of the exemption must be met for the employee to be exempt. Furthermore, the burden is on the employer (*not* the employee) to prove the requirements for the exemption. The exemptions are based on what an employee actually does; neither the employee’s job title nor the written job description is controlling.

An employer should not simply assume anyone is exempt. It must know and apply the requirements of the specific exemptions to determine if an employee is exempt.

(3) Are employees who are paid on a “per visit” basis exempt?

It is rather common in home care for employees to be paid on a “per visit” basis. However, merely paying an employee on a per visit basis does not mean the employee is exempt from minimum wage and overtime pay. An employee is exempt *only* if the employee meets all of the requirements of a specific exemption, such as the professional exemption.

Whether an RN who is paid on a per visit basis is exempt from overtime pay is discussed in another article on this web site (see, “Legal Ramifications of Per Visit Pay”). The same issues discussed in that article also would apply to a therapist paid on a per visit basis. LPN’s and home health aides, do not meet the requirements for the professional exemption and are entitled to minimum wage and overtime pay unless they meet the requirements for one of the other exemptions.

(4) Is an employee who is paid a salary exempt?

As with per visit pay, merely paying an employee on a salary basis does not mean that the employee is exempt from minimum wage and overtime pay. An employee is exempt only if the employee meets all the requirements of a specific exemption in the FLSA. While payment on a salary basis may be one of several requirements for an exemption,

by itself, it does not mean an employee is exempt. For example, a secretary who is paid a salary does not meet the requirements of any of the white collar exemptions and is still entitled to overtime pay. The legal distinction is not between salaried employees and hourly employees; it is between exempt and nonexempt employees.

(5) What does it mean to be paid on a “salary basis?”

It is not simply being paid a lump sum each workweek. In essence, subject to certain exceptions, it means the employee is paid a set amount each workweek that is not reduced because of variations in the quality or quantity of work performed. Subject to the exceptions permitted, the employee must receive his/her full salary for any workweek in which he/she performs any work without regard to the number of days or the number of hours worked, unless he/she performs no work at all during the workweek. The exceptions are set forth in the U.S. Department of Labor, Wage & Hour Division’s regulations concerning salary basis of payment. The salary may never be reduced due to an absence of less than one workday, except for FMLA leave.

Yes, it’s rather complicated.

(6) What happens if the person is not paid on a salary basis?

The employee’s exemption may be lost if being paid on a salary basis was important to his/her exemption. Plus, the exemption of all similarly situated employees may be lost too.

This can be avoided, however, by having a “salary basis of payment complaint procedure.” That means having a clearly communicated policy that:

- (a) Prohibits improper deductions;
- (b) Includes a complaint mechanism for employees to complain concerning improper deductions; and,
- (c) The employer reimburses employees for any improper deductions and makes a good faith commitment to comply in the future.

(7) Are registered nurses exempt from minimum wage and overtime pay?

Maybe, maybe not. It depends on whether the RN meets all the requirements of one of the exemptions. If the RN is paid on a salary basis, supervises other employees, and can hire and fire employees, she may meet the requirements for the executive exemption. If the RN is performing professional nursing duties and is paid on either a salary basis or a fee basis, she may meet the requirements for the professional exemption. (Whether per visit pay is fee basis of payment for purposes of the professional exemption is addressed in the article on this web site concerning “Legal Ramifications of Per Visit Pay”). On the other hand, if an RN is paid on an hourly basis, she usually will be entitled to overtime pay.

(8) Are therapists exempt?

The situation is the same as for RNs. Merely being a PT, OT, or ST does not mean a person is exempt. All the requirements of one of the exemptions must be met.

Therapy assistants, however, do not meet the educational requirements necessary for the professional exemption. Therefore, physical therapy assistants and certified occupational therapy assistants are usually entitled to overtime pay.

(9) Are medical social workers exempt?

Assuming the position requires a master's degree in social work, in our opinion (your advisors may differ), medical social workers meet the educational requirements of the professional exemption. Provided the other requirements are met (such as being paid on a salary or fee basis), we believe medical social workers would be exempt from minimum wage and overtime pay. We do not believe a social worker holding only a bachelor's degree would typically meet the educational requirements for the professional exemption. Once again, however, if they supervise other employees and are paid on a salary basis, they may meet the requirements of the executive exemption.

(10) Are licensed practical nurses exempt?

An LPN or LVN does not meet the educational requirements for the professional exemption. No matter how an LPN or LVN is paid, she or he will be entitled to overtime pay. Of course, if the LPN supervises other employees and is paid on a salary basis, it is possible the executive exemption could apply.

(11) Are home health aides, companions, sitters, personal care attendants, and live-ins exempt?

Maybe, maybe not. Merely being a home health aide, companion, etc. does not mean an employee is exempt from minimum wage and overtime pay.

It is possible, however, that a home health aide could meet the requirements of the companionship services exemption and thereby be exempt. To fall within the companionship services exemption:

- (a) an employee must perform companionship services as defined within wage and hour regulations;
- (b) general household work performed by the employee may not exceed 20% of the total weekly hours worked by the employee;
- (c) the work performed must not be of a type which requires and are performed by trained personnel, such as registered or licensed practical nurses; and
- (d) the services must be provided in the patient's private home. Furthermore, the Wage and Hour Division takes the position that the companionship services exemption is not available where the patient is in a hospital, nursing home, or assisted living facility. Independent living facilities also are suspect.

The companionship services exemption is narrowly applied. If an employer relies upon it to avoid paying minimum wage or overtime pay, it must be sure that each of the requirements of the exemption are met and can be proved. Both the job description and the actual duties of the employee should establish the facts necessary for the exemption.

Remember, too, the companionship services exemption may not be available under applicable state law.

(12) If an employee is nonexempt, what is the employee entitled to receive?

The FLSA requires a nonexempt employee (meaning one who does not fall within one of the FLSA's exemptions) be paid a minimum wage for all hours worked (currently \$7.25 per hour) and, with certain exceptions, overtime pay of one and one-half the employee's "regular rate" for all hours worked in excess of 40 hours in a workweek.

There is no requirement under the FLSA for daily overtime pay, holiday pay, vacation pay, and breaks during the work day, or on the total number of hours that may be worked by an employee. All that is required is minimum wage and overtime pay for hours worked in excess of 40 in a workweek.

(13) What is the workweek?

The FLSA establishes the workweek as the general standard for calculating the minimum wage and overtime pay due to an employee. The workweek is a fixed and regularly recurring period of 7 consecutive 24 hour periods. The workweek is established by the employer and can be different for different employees. It does not need to coincide with the payroll period.

(14) What is the "regular rate"?

A nonexempt employee is entitled to one and one-half the employee's "regular rate" for all hours worked in excess of 40 hours in a workweek. The regular rate is the hourly rate the employee is actually paid for each week's work; it can change weekly depending upon the payment arrangement with the employee.

It is calculated by dividing the employee's total remuneration for employment (except for certain remuneration permitted to be excluded by the FLSA) during the workweek by the total number of hours actually worked by the employee in that workweek.

The formula is:

$$\frac{\text{Total Remuneration} \\ \text{(except statutory exclusions)}}{\text{Total Hours Worked}}$$

Both "total remuneration" and "hours worked" have specific meanings under the law.

Unless an employer is aware of an employee's regular rate, it may not be properly calculating the overtime pay to which the employee is entitled.

Many employers make the mistake of simply paying time and one-half an employee's usual hourly wage. In other words, they either never determine the employee's "regular rate" or, if they attempt to calculate the regular rate, they do so incorrectly. The result is usually an underpayment of overtime pay due to the employee.

(15) We know of a hospital that pays its employees overtime pay for hours worked in excess of 8 hours in a day and in excess of 80 hours in a 14 day period; can other employers do that?

Under the FLSA, provided certain conditions are met, the overtime pay of hospital, nursing home, and certain residential facility employees can be calculated on a 14 day period, rather than the usual 7 day period applicable to other employers. Overtime pay under this arrangement is paid for hours worked in excess of 8 in a workday and in excess of 80 in the 14 day period (but any overtime payments for daily overtime may be credited toward the overtime pay due for hours in excess of 80). This special rule is known as the "8 and 80 rule".

Three criteria, in addition to certain other requirements, must be met before the 8 and 80 rule is applicable to a particular employee:

- (a) The employer must be a hospital, nursing home, or certain other residential facility;
- (b) The 8 and 80 rule applies only to activities of the hospital, nursing home, etc., which constitute the operation of a hospital, nursing home, etc.; and,
- (c) The employees involved must be engaged in such activities at least 80 percent of the time worked per workweek; and,

Therefore, no employer other than a hospital, nursing home, or certain other residential facility may use the 8 and 80 rule. For example, it is not available to an employer who is a physician or a home care agency. Furthermore, given what is meant under the FLSA as engaged in the operation of a hospital or nursing home (inpatient care), it is unlikely a hospital or nursing home's home care agency employees could be paid on the 8 and 80 basis.

Even when the 8 and 80 rule is available to an employer under the FLSA, it may not be permitted under state law.

(16) If employees are paid on a per visit basis, do we need to keep records of hours worked?

Yes. Merely paying employees on a per visit basis does not mean the employer's obligation to maintain records of actual hours worked is waived. Indeed, records of actual hours worked are required of per visit employees even if the employer is taking the position the employee is exempt under the professional exemption and paid on a fee basis. For nonexempt employees, the records and hours worked are necessary to properly calculate the employee's regular rate for overtime pay purposes.

(17) What is the effect of paying an employee on-call pay, meaning the pay for the inconvenience of carrying a pager?

If the employee is a salaried, exempt employee, paying separate on-call pay is not a difficulty. However, paying on-call to an exempt employee who is paid on a per visit basis may result in loss of the employee's exemption (see, the article "Legal Ramifications of Per Visit Pay" also on this website).

For nonexempt employees, the on-call pay is always included in the numerator for computation of the employee's regular rate. However, the on-call hours (the time spent carrying the pager) are usually not considered "hours worked" to be included in the denominator of the regular rate calculation. The effect of the on-call hours not being "hours worked" is to increase the employee's regular rate during the workweek he or she was on-call and received on-call pay.

An employer who is not including the on-call pay in the regular rate calculation usually is not paying the full amount of overtime pay to which the employee is entitled.

(18) What about state law? Does it make any difference if an employer provides services in more than one state?

You must always consult the law of your state in addition to the FLSA. This article is based upon the FLSA; the law of your state could be different. States range from having no law concerning minimum wage and/or overtime pay to having very detailed requirements.

The FLSA does not replace state laws which establish more beneficial standards for employees than does the FLSA. For example, even though an employee is exempt under the FLSA, that employee may still be entitled to minimum wage or overtime pay under state law. The requirements of state law must always be considered in addition to the FLSA to determine if state law requirements are more beneficial to the employee.

If an employer is providing services in more than one state, it must consult the law of each state to determine if its pay practices need to be different from state to state. The differences from state to state can be significant.

(19) Can an employer give employee compensatory time off rather than pay overtime pay?

Yes, under the FLSA, but, if it understands the situation, it probably does not want to do so.

To attempt to relieve themselves of liability for overtime pay, employers sometimes grant time-off in lieu of paying overtime pay (commonly called "comp time"). Such time-off plans can avoid an employer's overtime pay liability under the FLSA only if the time off plan is properly structured and carefully administered. Unfortunately, unless an employer carefully meets the requirements for a valid time-off plan, the employer can be in the unenviable position of having granted an employee paid time-off and still being liable to the employees for overtime pay.

Time-off arrangements are permitted under the FLSA only in very limited circumstances and if specific arrangements are met. For example, one requirement is that the time-off must be given in the same pay period in which the overtime was worked. Rarely have employers taken that or any of the other requirements into account in structuring their time-off plans. In most cases, if an employer is granting time-off in lieu of payment of overtime pay to its nonexempt employees, it probably has not removed its overtime pay liability.

The FLSA does permit public employers to utilize a compensatory paid off plan in lieu of payment of overtime pay to its nonexempt employees. Specific requirements exist with respect to such compensatory time-off plans by public employers. Those requirements and rules do not apply to private employers.

Even if an employer structures a time-off plan which meets the FLSA's requirements, it still may not be permitted under an applicable state law.

(20) Do we have to pay for overtime that we did not authorize to be worked?

Probably. If you knew or should have known that the time was being worked, it counts as hours worked and you have to pay for it even though you did not actually authorize it.

(21) Do we have to pay employees for time spent in inservices?

Once again, if the employee is exempt, an employer does not need to do so.

For nonexempt employees, the employer probably must do so. Whether or not a nonexempt employee's time spend in attending employer sponsored training programs, lectures, or meetings is compensable time depends upon several factors. According to government enforcement policy under the FLSA, such time does not need to be counted as compensable time if all of the following conditions are met:

- (a) Attendance occurs outside the employee's regular working hours;
- (b) Attendance is voluntary (it is not voluntary if it is required by the employer or the employee is led to believe that non-attendance will adversely effect his or her present working conditions or the continuation of employment);
- (c) The employee does no productive work while attending; and,
- (d) The program, etc. is not directly related to the employee's job (it is directly related if it aides in handling his or her present job rather than teaching another job or induced skill).

(22) Does an employer have to pay for an employee's travel time?

If the employee is exempt, it is not necessary to deal separately with travel time.

If the employee is nonexempt, the question is whether or not the travel time constitutes hours worked for minimum wage and overtime pay purposes. As a general rule, travel from home to work and from work to home is not "hours worked". However, travel

during the workday from job sit to job site is working time. Special rules exist for out of town travel for a day or for overnight.

(23) What is the effect of paying a nonexempt employee a bonus?

Depending upon how the bonus is structured, the amount of the bonus may need to be included in the numerator of the employee's regular rate calculation. If the bonus is earned over a period of time, it may need to be allocated to all the workweeks during that period. If the bonus must be included in the regular rate calculation, it will increase the amount of overtime pay to which an employee is entitled.

If an employer has established a bonus program for its employees without considering its effect upon employee's overtime pay under the FLSA, it may be improperly calculating the overtime pay due to the employee.

(24) If we have two separate corporations and an employee works for both in the same workweek, do we have to aggregate the employee's time for both corporations for overtime pay purposes?

Possibly. Unless the employment by the two corporations are completely disassociated from one another, it is possible that time worked for each must be added together to determine whether the employee has worked more than 40 hours in that workweek. The two corporations can be viewed as "joint employers" of the employee and either can be liable for the overtime pay due to the employee. The Wage and Hour Division appears to be becoming much more aggressive in attempting to "collapse" such arrangements for overtime pay purposes.

If an employer has such an arrangement and treats the hours worked by the employee separately for each corporation, it should have the arrangement reviewed by knowledgeable legal counsel to determine whether it is in compliance with the FLSA.

(25) Why do you believe an employer usually should have separate employee handbooks and personnel policies for its salaried, exempt employees and for its nonexempt employees?

Because some of the white collar exemptions can be dependent upon an employee being paid on a "salary basis" as defined in FLSA regulation, if an employer has one set of personnel policies/handbooks covering both salaried, exempt employees and nonexempt employees, those policies can easily result in loss of the exemption. This is because the policies typically do not reflect the "salary basis of payment" requirements with regard to paid and unpaid time off; problems also can occur with unpaid disciplinary suspensions.

Although it is possible to draft one set of personnel policies or an employee handbook which properly addresses both exempt and nonexempt employees, it is usually much easier (and certainly more readable) to have at least two sets of policies: one covering salaried, exempt employees which reflects the salary basis of payment requirements; and, another which address nonexempt employees.

(26) Will the local Wage and Hour Office help us comply with the law?

Local Wage and Hour Offices of the United States Department of Labor certainly want to assist employers in complying with the FLSA's requirements and make a special effort to do so.

However, in our experience, for some health care employers (especially home care agencies), difficulties arise because Wage and Hour Division employees may not understand the employer's home care operation and pay practices let alone the application in health care of rules and regulations developed in the manufacturing, industrial, and retail settings.

In other words, the Wage and Hour Division wants to be helpful but, frankly, can give incorrect advice. The situation is somewhat like dealing with IRS. When the law is unclear, an employer will simply receive the government's position rather than what may be the case if the matter were contested or carefully researched.

Furthermore, that the action taken was recommended or approved by a local Wage and Hour Office is not a defense to a wage and hour violation. In other words, simply having been told to do things a certain way by a local Wage and Hour Office does not insulate the employer from violations and liability.

You would expect a law firm to say this, but we believe you are usually better utilizing the services of your own legal counsel rather than blindly relying upon the government's advice.

(27) Is wage and hour enforcement increasing?

Yes, dramatically. Health care employers have been identified for special scrutiny.

(28) What is an employer's liability if it does not comply with the FLSA's requirements?

Failure to comply with minimum wage and overtime pay requirements under the FLSA can result in significant civil and criminal liability. For most employers, the risk is primarily civil liability for back pay and possibly twice that amount in damages, civil monetary penalties, and attorneys' fees. Injunctive relief also can be sought. Usually, the back pay liability is for the past 2 years, but, if the violation is found to be willful, the liability can be for the past 3 years. As mentioned earlier, the back pay liability can be quite large.

(29) Can I be personally liable?

Yes. If you the owner or are responsible for compensation matters in your organization, you can be personally liable for the amounts owed. This is true even if your organization is a corporation or limited liability company.

(30) How can we know if we are in compliance?

Unless you are willing to spend hours learning wage and hour's many requirements, including opinion letters and court decisions, the best way is to have your organization's

pay practices reviewed by an attorney familiar with wage and hour.

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