



Overtime Myths

The risky realities around overtime rules for non-exempt workers

Compliance **HR**
Simplifying the Complexity of Employment Law

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Overtime Myths

Introduction

The laws governing overtime are complex, and the tests to determine eligibility are ambiguous enough that they can create significant compliance risk for employers who are not diligent in their application.

Because of this complexity, there are often misunderstandings about overtime rules and how to determine exemptions. This ComplianceHR whitepaper highlights some of the most common myths along with the reality of the FLSA's requirements.

FLSA Overview

The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees (often referred to as “hourly” employees) an overtime premium if they work more than 40 hours in a workweek. The overtime premium must be at least 1.5 times the employee’s regular rate of pay.

The US Department of Labor (DOL) has established a three-pronged test to determine eligibility for overtime, defining what is referred to as a non-exempt employee:

1. Minimum salary threshold
2. Salary basis test
3. Primary duties test

In addition to this three-pronged test, there are also a number of established exemptions to the overtime rules. These exemptions define what is often called an exempt employee, including, but not limited to:

- Executive
- Administrative
- Professional
- Computer
- Outside-sale
- Highly Compensated

Please refer to the companion ComplianceHR whitepaper, *The Danger of Making the Wrong Overtime Classification Decision*, for a thorough overview of the FLSA law and the compliance risks it can introduce to an organization.

Common Myths

Myth:

Employers Must Pay Overtime to Any Employee Working More Than 40 Hours.

Reality:

This first myth is a fairly simple one. It gets to the core definition and requirements for a worker to be classified as a non-exempt employee under the FLSA regulations. Simply put, non-exempt employees must be paid overtime. Conversely, there is no overtime requirement for exempt workers, **provided they are classified properly.**

In general terms, exempt employees are “white collar” employees who meet *all* of the following conditions:

- They are salaried, which means they receive a fixed, predetermined payment. However, under the final rule, up to 10% of the standard salary level can come from non-discretionary bonuses, incentive payments, and commissions paid at least quarterly.
- They are paid more than a threshold amount per week or annually.
- They primarily perform executive, administrative, or professional duties.

Note: For the most up-to-date details on the FLSA, please refer to the Department of Labor’s wage and hour website, and also see ComplianceHR’s “The Danger of Making the Wrong Overtime Classification Decision” whitepaper for an overview of misclassification risk.

Myth

White-Collar or Management Jobs Are Always Exempt from Overtime Pay

It is also possible for white-collar or management positions to be non-exempt.

Reality

Most people associate overtime pay with unskilled hourly labor, such as working as a clerk in the retail or the food service industries. While it is true that these types of roles are eligible for overtime pay, it is also possible for white-collar or management positions to be non-exempt.

As we saw in the previous myth, in order to classify a worker as an exempt employee, they must meet the federal (FLSA) and any state requirements. Even if an employee is promoted to a management position, or is otherwise in charge of supervising other employees, he or she may still be entitled to earn overtime pay. Titles such as “manager” or “supervisor” don’t necessarily confer overtime-exempt status.

Myth

Salaried Employees Cannot Earn Overtime Pay

The employee must meet very specific criteria in order to be considered exempt. This is determined by the worker’s job duties, not the way that they are paid, or their professional title.

Reality

Contrary to what many employers might believe, the fact that a person is paid on a salary basis, rather than an hourly basis, does not automatically exempt that person from the right to receive overtime pay.

There is often confusion about the differences between a salaried and an exempt employee because the terms are sometimes used interchangeably by managers. Employers have the option of paying non-exempt employees on a salary basis. However, simply because an employee is paid on a salary basis does not mean the employee is exempt from overtime.

The employee must meet very specific criteria in order to be considered exempt. This is determined by the worker’s job duties, not the way that they are paid, or their professional title. These exemptions are narrowly defined and are based on an established set of criteria relating to the employee’s salary and duties.

Myth

Employers Must Pay Overtime for Night Work

Reality

Many jobs, particularly in the service and healthcare industries, might require employees to work nights. Assuming that the hours do not exceed 40 hours per week, no overtime is necessary for this work schedule.

Remember that federal overtime pay rules apply to employees regardless of shifts or location, except for states that have more stringent policies, but more on that later.

Myth

You Must Pay Overtime If Someone Works Weekends

Reality

As in the case of evening or overnight schedules, working weekends does not automatically trigger overtime. Again, overtime is required only if an employee works more than 40 hours per week.

The same is true for holidays. Requiring an employee to work on Thanksgiving does not require overtime pay (although you aren't prevented from paying more than the usual amount).

Myth

Overtime Is Only Earned When an Employee Works 40+ Hours Per Week

Reality

This myth is partially true, but there is a caveat. It is correct under the Fair Labor Standards Act, but some states have more onerous rules for overtime compensation, which can override the FLSA. For instance, in California non-exempt employees begin earning overtime as soon as they begin working for more than eight hours in a day. This means that an employee can theoretically work 40 hours per week and still earn some overtime pay.

Myth

Federal Overtime Rules Trump State Rules

A number of states have their own overtime pay rules.

Reality

A number of states have their own overtime pay rules. If they are more beneficial for workers, the FLSA requires employers to follow the state law.

As we saw in the previous myth/reality, California (and some other states) base overtime pay requirements on a daily rather than weekly basis. If a non-exempt employee in California works more than 8 hours a day, overtime pay is required, even if total hours in the workweek do not exceed 40 hours.

As a general rule, if an employee is non-exempt, under either federal or state law, the employee must be classified as non-exempt and receive overtime pay in accordance with that law.

Myth

Employees May Waive Their Right to Overtime as Long as It Is in Writing

Overtime pay is based on actual time worked by non-exempt employees in excess of 40 hours.

Reality

Overtime pay is based on actual time worked by non-exempt employees in excess of 40 hours. Employers cannot avoid paying overtime by making a policy or signing a waiver agreement with workers. If a non-exempt employee works more than 40 hours despite any policy, agreement, or announcement to the contrary, the employer must pay overtime.

The bottom-line is that employers may not craft an agreement with employees to waive their right to overtime. If they do not satisfy the tests for exemption, they must be classified as non-exempt and paid overtime whenever they work more than 40 hours in a work week.

Myth

Unauthorized Overtime Does Not Need to be Paid

Reality

It is a common misconception that “unauthorized” overtime need not be paid by the employer. In reality, if an employee has worked overtime, they must be paid overtime, regardless of whether the overtime was authorized.

This myth illustrates the need for management education and training on the rules and application of the FLSA. Organizations may establish a policy governing overtime. However, any time an employer is aware, or should reasonably be aware that an employee is working, that employee must be paid for that time. If that work takes the employee into overtime, they must be paid full overtime wages.

Myth

Employer Can Offer Employees “Comp Time” in Lieu of Overtime Pay

Reality

Compensatory time off (often called “comp time,” by HR professionals) is paid time off that is offered instead of cash payment for working overtime hours. An employer cannot avoid the need to pay overtime by giving a worker time off comparable to the overtime they worked.

Here’s a common example: A non-exempt employee works 45 hours in one week, which entitles them to overtime (cash wages) for the 5 additional hours. The employer cannot avoid the requirement to pay overtime by giving the worker 5 hours off the following week.

Myth

Overtime Rules Do Not Apply to Independent Contractors (ICs)

Misclassification of non-exempt employees can occur in several ways. One of the most common is to misclassify a worker as an independent contractor when they are, in fact, a non-exempt employee.

Reality

We saved this myth for last because it is a tricky one. Why? Because it is technically correct, but with one significant caveat – the worker and the project they have been engaged to deliver must meet the federal and state independent contractor compliance criteria in order to be properly classified as an IC.

Misclassification of non-exempt employees can occur in several ways. One of the most common is to misclassify a worker as an independent contractor when they are, in fact, a non-exempt employee. There can be a significant financial incentive for unscrupulous organizations to do this in order to avoid extra employer burdens, like having to pay for employee benefits and overtime.

Note: If you are concerned about independent contractor compliance and would like to learn more about a solution that will help you to mitigate the risk of IC misclassification, then you should check out [ComplianceHR's Navigator IC solution](#). We've also authored a whitepaper on [5 potential strategies to help mitigate IC misclassification](#).

Conclusion

Non-compliance with the FLSA, or their state equivalents, can be very costly for employers. In addition to developing core internal expertise on determining overtime eligibility, it is also very helpful to be aware of the most common overtime myths.

Employers can find more information about the FLSA and overtime pay from the Department of Labor's [Wage and Hour Division website](#). Many employers rely outside counsel, or expert systems like ComplianceHR's Navigator OT to help them determine exempt/non-exempt status.

Disclaimer

This whitepaper is intended to serve as a starting point for educating Human Resources and Legal professionals on certain aspects of legal obligations of employers. It is not a comprehensive resource or a complete explanation of requirements. It offers practical information concerning the subject matter and is provided with the understanding that ComplianceHR is not rendering legal or tax advice, or other professional services. The contents are intended for general informational purposes only, and you are urged to consult your attorney concerning any particular situation and any specific legal questions you may have.

ComplianceHR's Navigator OT

ComplianceHR's Navigator OT solution eliminates much of the legwork and helps to reduce the headache of evaluating roles for overtime exemption.

Navigator OT provides you with:

- A simple digital questionnaire to capture your specific fact pattern
- A summary of the relevant federal and state exemption standards
- Actionable risk assessment(s) driven by expert analysis of over 2,400 court cases and federal and state regulations
- Instant actionable guidance and a customized report on how to lower your misclassification risk
- A complete questionnaire transcript

Overall Risk

Without taking compensation into account, it is **Moderately High Risk** to classify this position as exempt.



This is the lowest risk of all the exemptions the position is qualified for. Learn more about compensation requirements and each exemption below.

Analysis of the Administrative Exemption

Moderately High Risk

Compensation Requirements Met

Riskiest Factors

Discretion and Independent Judgment To qualify for the administrative exemption, a position must exercise discretion and independent judgment on matters of significance. The exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered.

Questionnaire Transcript

Evaluation of Director X-Submitted by worth+ot@compliancehr.com

Answers Provided

Does this position perform work in a computer, software, or information technology field?	No
Does this position perform work in any of the following artistic or creative fields?	None or the above
Does this position sell the Company's products or services?	No
Does this position use any manuals, guidelines, or other established standard procedures (SOPs) in the performance of the job?	No

Navigator OT helps to simplify the complexity of employment law and mitigates the risk of misclassifying a non-exempt employee as exempt from overtime. If you would like to learn more about Navigator OT, an expert system built with the employment law expertise and legal knowhow of Littler, please [sign up for a demonstration](#).