



# County Technical Assistance Service

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## Overtime Provisions

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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 county 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 e-Li material.

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## Overtime Provisions

**Reference Number:** CTAS-165

The FLSA requires that an employer compensate covered, nonexempt employees who work in excess of a maximum number of hours in an applicable workweek or work period on a time-and-one-half basis for all hours in excess of the number of allowable hours. For most employees the relevant work period is the seven-day workweek, and the maximum number of hours is 40. However, a longer work period may be used for public safety employees and hospital and similar employees if the local government follows specific procedures established by the FLSA. If these specific procedures for establishing longer work periods are not followed, all local government employees covered by the FLSA, including firefighters and law enforcement officers, must be compensated for hours worked in excess of 40 hours in a seven-day period.

Many employees work only a part-time work schedule (e.g., 15 to 20 hours per week). Other employees work full-time but work 35- or 37½-hour workweeks. In such instances, overtime pay under the FLSA is not required to be paid to employees until they work in excess of 40 hours in a workweek. (Note, however, that the employee may be entitled to pay at the regular rate for any additional hours up to 40, depending on the employer's established policy.)

There is no limitation under the FLSA on the number of hours employees may work in any work period. They may work as many hours as they and their employer see fit, as long as they are compensated in accordance with the FLSA's requirements. The FLSA does not require overtime compensation for hours in excess of eight per day (except under the special provisions relating to hospital and similar employees) or for work on Saturdays, Sundays or holidays.

It is not required that overtime compensation be paid weekly. The general rule is that overtime pay earned in a particular work period must be paid on the regular payday for the period. If the correct amount of overtime pay cannot be determined until sometime after the regular pay period, the employer must pay the overtime compensation as soon thereafter as practical, but not later than the next regular pay period.

## Calculating Overtime Pay

**Reference Number:** CTAS-129

Overtime pay is calculated by multiplying the employee's regular rate of pay by one and one-half times the number of overtime hours worked. The regular rate is defined as the rate per hour paid for normal non-overtime work. In cases in which the employee is paid on a weekly basis, the regular rate is determined by dividing the weekly salary by the number of hours in the employee's regular workweek. Payments which need not be included in the regular rate include reimbursement for expenses incurred on the employer's behalf; premium pay for extra time worked (holidays, weekends, additional hours over regular schedule); discretionary bonuses, gifts and payments in the nature of gifts on special occasions; reasonable uniform allowances; and payments for occasional periods when no work is performed due to vacation, holidays or illness.

The following are examples of compensation paid to non-exempt employees that is includable in the regular rate of pay:

- On-call pay
- Bonuses promised for good attendance, continuation of the employment relationship, incentive, production, and quality of work
- Employee lunch or meal expenses paid by the employer, unless the expense is incurred on the employer's behalf or for the employer's benefit (e.g., dinner money while working late or meal expenses while out of town on business)
- Salaries
- Salary increases, including retroactive increases
- Shift differentials, hazardous duty pay and longevity pay
- Travel expenses of employees going to and from work, if they are paid by the employer

The regular rate of pay and overtime must be calculated prior to making deductions from wages, such as deductions for charitable contributions by the employee, garnishments, insurance premiums paid for the employee's convenience, re-payment of salary advances, withholding taxes for or on behalf of the employee, health plan contributions, and voluntary wage assignments.

The FLSA does not require employers to pay employees on an hourly basis. Their earnings may be determined on a daily rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed

on the basis of the hourly rate derived from such earnings. The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment (except the statutory exclusions) in any workweek by the total number of hours actually worked in the workweek. A few examples will illustrate the application of this principle in particular instances.

## Hourly Rate Employees

**Reference Number:** CTAS-962

If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate.” For overtime hours the employees must be paid, in addition to the straight-time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked over 40 in the week. If, for example, the hourly rate is \$10.00 and an employee works 46 hours in a week, the employee would be entitled to receive \$490.00 (46 hours at \$10.00 plus six hours at \$5.00; or stated another way, 40 hours at \$10.00 plus six hours at \$15.00 (time and one-half)). The regulations governing hourly rate employees are found at 29 C.F.R. § 778.110.

## Day Rates and Job Rates

**Reference Number:** CTAS-963

An employee may be paid a flat sum for a day’s work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case the employee’s regular rate is found by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked over 40 in the workweek. This method of payment is common for school bus drivers. The regulations on this topic are found at 29 C.F.R. § 778.112.

## Employees Paid on a Salary Basis

**Reference Number:** CTAS-964

If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate. Example 1: If an employee is hired at a salary of \$250 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or \$7.14 an hour, when overtime is worked the employee is entitled to receive \$7.14 for each of the first 40 hours and \$10.71 (time and one-half) for each hour thereafter. Example 2: If an employee is hired at a salary of \$350 for a 40-hour week, the regular rate is \$8.75 an hour.

For employees who regularly work less than 40 hours in a workweek, state law requires that the county employer have a written policy in place that states whether the salary is intended to compensate the employee for all hours worked up to and including 40 in the workweek, or whether it compensates the employee for the regular work schedule.<sup>[1]</sup> This will affect the hourly rate, as it did in the two examples above. Also, if the salary does not compensate the employee for the full 40 hours as in the first example above, and if the employee works more than the 35 hours (or other amount) that the salary covers, the employee will have to be paid for the additional hours at the regular hourly rate up to and including 40 hours, and for any hours worked over 40 at the rate of time and one-half.

Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary can be converted to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its equivalent weekly wage by multiplying by 24 and dividing by 52. The regulations on overtime for salaried employees are found at 29 C.F.R. § 778.113.

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[1] T.C.A. § 5-23-104. See Chapter 8.

## Employees Working at Two or More Rates

**Reference Number:** CTAS-965

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Such an employee may agree with his or her employer in advance to be paid overtime for the type of work that is performed during the overtime hours. An example of this might be a school librarian who also works part of the week as a teacher's aide at a different rate of pay. The regulations on this topic are found at 29 C.F.R. §§ 778.115 and 778.419.

## Multiple Jobs/Dual Employment

**Reference Number:** CTAS-966

The DOL views a county as a single employer so that an employee who works for two different departments of the same county is considered to be working for the same employer. Therefore, all jobs the employee performs for the county must be aggregated for overtime purposes. If both jobs are non-exempt work, see [Employees Working at Two or More Rates](#). If the two jobs are both exempt work, of course there is no overtime problem. If an exempt employee also performs a second job which is non-exempt, the employee's primary duty must continue to be exempt work or the employee will lose the exemption for all of the work. The primary duty requirement is discussed in more detail under [Exempt Employees](#), but essentially if the employee's primary duty continues to be exempt work, the employee may perform some nonexempt work without losing the exemption. The general rule of thumb is that non-exempt work cannot exceed 50 percent of the employee's time, but it depends on the facts and circumstances of each case. Also, while exempt employees must be paid on a salary basis, the regulations now allow exempt employees to receive additional compensation above the guaranteed minimum salary and it can be based on additional hours worked above the normal workweek.<sup>[1]</sup>

There is a limited exception to the requirement that the hours of both jobs be combined for overtime purposes. This occurs when an employee works on an "[occasional or sporadic](#)" basis in a different job for the county.

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<sup>[1]</sup> 29 C.F.R. § 541.604.

## Occasional or Sporadic Employment

**Reference Number:** CTAS-967

Where county employees, solely at the employee's option, work occasionally or sporadically for the county in a different capacity from their regular employment, the hours worked in the different jobs are not combined for the purpose of determining overtime liability. However, two major restrictions apply to this exception: (1) the additional work may be done only on an occasional or sporadic basis; and (2) the work must be in a different capacity from the employee's regular work.<sup>[1]</sup>

"Occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. However, the mere fact it is a recurring activity does not necessarily mean it fails to be occasional or sporadic. The regulations suggest that part-time work that is regularly scheduled is not sufficiently irregular to qualify for the exception.

"Solely at the employee's option" means freely and without coercion, implicit or explicit, from the employer. A suggestion that the employee is free to refuse is allowed. Examples of such activities include taking tickets or providing security for special events, officiating youth sporting events and concession work at special events.

Under the "different capacity" prong of the test, DOL will rely primarily on whether the two jobs are classified as different occupations under the three-digit classification system established by the U.S. Department of Commerce's Dictionary of Occupational Titles (DOT). If they are in the same three-digit occupational category, then they will be deemed not to be sufficiently different. If, however, they fall into separate three-digit occupational classifications, they are likely to be considered sufficiently different to qualify for the exception. The three-digit classifications tend to be relatively broad (e.g., secretaries, stenographers, and typists represent a single occupational category) and, consequently, certain jobs, even though clearly different in a practical sense, will not qualify as "different capacity" jobs for purposes of the exception.

Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a “different capacity,” nor are teachers doing coaching or career counseling. It is not clear, however, that this provision is of any real significance as teachers are generally exempt from the FLSA under the exemption for professional employees.

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[1] See 29 C.F.R. § 553.30.

## On-Call Pay

**Reference Number:** CTAS-968

If an employee who is “on call” is free to use the time as he or she pleases, not confined to home or any particular place but required only to leave word where he or she may be reached, the hours spent “on call” generally are not regarded as working time. The FLSA does not require any compensation for carrying a beeper or being on call. However, if the employer chooses to pay the employee for this non-working time, the payment must be included in the employee’s regular rate of pay even though it is not attributable to any specific hours worked.<sup>[1]</sup> For example, an employee is paid \$8.00 an hour for 40 hours of work and is paid \$25.00 for being on call over the weekend. If the employee is called back for four hours of work over the weekend, the employee’s regular rate would be computed as follows: the employee’s total straight time pay is \$320.00 (40 hours x \$8.00) plus \$25.00 “on call” pay plus \$32.00 for four weekend hours of work, or \$377.00. Dividing the employee’s total earnings of \$377.00 by 44 hours of work yields a regular rate of \$8.57 for the employee. One-half the regular rate (\$4.29) times four overtime hours equals \$17.16 of overtime pay due the employee, making the total pay due the employee \$394.16 for the week.

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[1] See 29 C.F.R. § 778.223.

## Fixed Salary for Fluctuating Hours

**Reference Number:** CTAS-168

The FLSA authorizes the payment of a fixed salary for fluctuating hours. The regulations<sup>[1]</sup> provide that a salaried employee may have hours of work that fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding between the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, this kind of salary arrangement is permitted by the FLSA. The amount of the salary must be sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour the employee works. The employee must also receive extra compensation, in addition to the regular salary, for all overtime hours worked at a rate not less than one-half his or her regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because the hours have already been compensated at the straight time regular rate under the salary arrangement. The fixed salary can cover hours in excess of 40 hours a week, provided the employee has a clear understanding that the salary constitutes straight-time pay for all hours worked and the straight-time pay is equal to or exceeds the required minimum wage of \$7.25. The fixed salary must be large enough to insure that the employee’s hourly earnings from the salary will not fall below minimum wage. The employee must understand that the salary covers whatever hours the job may demand in a particular workweek. The employer must pay the salary even though the workweek is one in which a full schedule of hours is not worked. Also, it should be noted that employees who are paid under the rules for fluctuating workweeks are not eligible to receive compensatory time in lieu of cash overtime payments.

For an employee whose hours of work fluctuate from week to week and who is paid a fixed salary with the clear understanding that the salary constitutes straight-time pay for all hours worked, the regular rate of pay will vary from week to week. The regular rate is obtained for each week by dividing the fixed salary by the number of hours

worked in that week, but cannot, of course, fall below the required minimum hourly wage in any week. Since straight-time compensation has already been paid for all hours worked by way of the fixed salary, the employee is entitled to receive overtime pay for each hour worked over 40 in the workweek at a rate of not less than one-half this straight-time compensation. As an example, consider the employee who is compensated on a fluctuating workweek basis at a weekly salary of \$500. If during the course of four weeks the employee works 40, 44, 50 and 48 hours, the regular hourly rate of pay in each of these weeks is \$12.50, \$11.36, \$10.00 and \$10.42. Since straight-time pay for all hours worked has already been paid by the fixed salary, only an additional half-time pay is due for each hour over 40 in each week. For the first week the employee is due \$500.00; for the second week \$522.72 (\$500 plus 4 hours at \$5.68); for the third week \$550.00 (\$500.00 plus 10 hours at \$5.00); for the fourth week \$541.68 (\$500 plus eight hours at \$5.21).

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[1] These regulations are found at 29 C.F.R. § 778.114.

## Determination of Applicable Workweek or Work Period

**Reference Number:** CTAS-969

The FLSA authorizes the establishment of different work periods for different types of employees. The general rule for regular employees applies to all covered local government employees, unless a different work period is properly established as authorized by the FLSA for public safety employees or hospital workers.

For regular employees, the maximum number of allowable hours that may be worked before overtime must be paid is 40 hours per workweek. The workweek, as defined by the FLSA, is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods. The workweek need not coincide with the calendar week but may begin on any day and at any hour of the day. A single workweek may be established for all employees, or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.

The FLSA requires a single workweek as its standard and does not permit averaging of hours over two or more weeks. For example, an employee who works 30 hours one week and 50 hours the next must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40. This is true regardless of whether the employee works on a standard or swing shift schedule and regardless of whether payment is made on a daily, weekly, bi-weekly, monthly or other basis.

## Overtime Pay May Not Be Waived

**Reference Number:** CTAS-992

The requirement that overtime must be paid after 40 hours a week cannot be waived by agreement between the employer and employees. Similarly, an agreement that only eight hours a day or only 40 hours a week will be counted as working time will clearly fail. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for the overtime work that the employer suffers or permits (has knowledge of).

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