

**Overtime . . . What's That?**  
**A Basic Understanding Of Federal And**  
**New Jersey Overtime Laws**

**September 20, 2006**

**Thomas A. Linthorst**  
**Prashanth Jayachandran**  
**Scott E. Ross**  
**MORGAN, LEWIS & BOCKIUS LLP**  
**502 Carnegie Center**  
**Princeton, NJ 08540**  
**(609) 919-6642**  
[tlinthorst@morganlewis.com](mailto:tlinthorst@morganlewis.com)  
[pjayachandran@morganlewis.com](mailto:pjayachandran@morganlewis.com)  
[sross@morganlewis.com](mailto:sross@morganlewis.com)

**© 2006 Morgan, Lewis & Bockius LLP. All Rights Reserved.**

# I. Overtime . . . What's That?: A Basic Understanding Of Federal And New Jersey Overtime Laws

## A. Basics Of Overtime Under Federal And New Jersey Law

### 1. What Is Compensable Work?

#### a. Federal Law

- (i) Work is “physical or mental exertion (whether burdensome or not) [if it is] controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.” Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944). Whether pre-shift reporting time is compensable will depend on the facts that determine whether the employee is “engaged to wait” or “waiting to be engaged.” Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944).
- (ii) The position of the United States Department of Labor (hereinafter “DOL”) is that if an employee is required to be at work prior to the start of his scheduled day, compensation is due to the employee. 29 C.F.R. § 790.6(b). Some courts have also found required pre-shift time to be compensable under law. Brock v. DeWitt, 633 F. Supp. 892 (W.D. Mo. 1986) (holding that because the employees were required to be at the workplace, their “workday” began at the time they were required to show up at work). Typically, time spent waiting to perform work is work if that time is controlled by the employer. See, e.g., Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004). The fact that employees are engaged in work-related activities during this time strengthens the argument for compensation, as the DOL’s regulations define “hours worked” to include “all time during which an employee is suffered or permitted to work whether or not he is required to do so.” 29 C.F.R. § 778.223. Further, some courts have held that an employer cannot knowingly allow an employee to do pre-shift or post-shift work that benefits the employer and then not compensate them. See, e.g., Handler v. Thrasher, 191 F.2d 120, 123 (10th Cir. 1951); Mumbower v. H.R. Callicott, 526 F.2d 1183, 1188 (1st Cir. 1975).
- (iii) The 1947 Portal-to-Portal Act states that preliminary work performed prior to or after the workday’s principal activities is not compensable. 29 U.S.C. § 254(a)(2). Accordingly, work does not include activities that are

preliminary or postliminary to the principal activity of work unless they are “an integral and indispensable part of the principal activities for which covered workmen are employed.” Steiner v. Mitchell, 350 U.S. 247, 256 (1956).

- (a) The United States Supreme Court recently addressed whether postdonning and predoffing walking time is considered integral and indispensable to an employees’ work and is specifically excluded by § 4(a)(1) of the Portal-to-Portal Act. IBP, Inc. v. Alvarez, 126 S. Ct. 514, 521 (2005). In Alvarez, production workers employed by a meat products producer contended that they were entitled to compensation for time spent walking to their work areas after donning protective gear and for time spent waiting to don the gear. Id. at 522. The employers argued that donning and doffing protective gear was not itself a principal activity of the employees which started the workday, and thus compensation for walking from the changing area to the area of principal activity was not compensable. Id. at 523. The Court held that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ under § 4(a) of the Portal-to-Portal Act.” Id. at 525. “Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is . . . covered by the FLSA.” Id. However, the time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday is excluded from the scope of the FLSA under § 4(a)(2) of the Portal-to-Portal Act. Id. at 528.
  
- (iv) Congress has not provided clear guidance on what constitutes a principal activity, but generally, “the more the preliminary activity is undertaken for the employer’s benefit, the more indispensable it is to the primary goal of the employee’s work and the less choice the employee has in the matter, the more likely such work will be found to be compensable.” Reich v. New York City Trans. Auth., 45 F.3d 646, 650 (2d Cir. 1995). In contrast, if the preparatory or concluding activity is conducted for the convenience of the employee, it is not integral and indispensable to the principal activity and not compensable. See, e.g., Blum v.

Great Lakes Carbon Corp., 418 F.2d 283, 287-88 (5th Cir. 1969) (stating that employees not entitled to overtime compensation for initiating a practice of starting work thirty minutes early, which enabled them to be relieved early by the incoming shift). In an oft-cited case, the court held that the test to determine which activities are “principal” and which are an “integral and indispensable part” of principal activities is not “whether the activities in question are uniquely related to the predominant activity of the business, but whether they are performed as part of the regular work of the employees in the ordinary course of the business.” Dunlop v. City Elec. Inc., 527 F.2d 394, 400-01 (5th Cir. 1976) (stating that regularly performed preparatory activities of electricians that enabled them to depart from their shop by the beginning of their paid workday qualified as “principal” activities for purposes of overtime compensation).

- (v) The test in the regulations and adopted by the Supreme Court for determining whether employers must compensate employees for on-call time is a fact-based question of whether the employees are required to remain on the employer’s premises or so close to the premises that the employees cannot use the time effectively for their own purposes. 29 C.F.R. § 785.17; Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Courts balance the facts of each case to determine whether the limitations on employee freedoms prohibit the employees from using the time effectively for their own private pursuits. Skidmore, 323 U.S. at 140. Courts also examine the facts of each case to determine whether the time in question is primarily for the benefit of the employer or whether the employee was “waiting to be engaged.” Id. at 137. Employers may impose some restrictions on employees who are on call without the time being compensable; otherwise, “all or almost all on-call time would be working time, a proposition that the settled case law and administrative guidelines clearly reject.” Bright v. Houston N.W. Med. Ctr. Survivor, 934 F.2d 671, 677 (5th Cir. 1991).

b. New Jersey Law

- (i) All time an employee is required to be at his place of work or on duty is counted as compensable work. N.J. ADMIN. CODE 12:56-5.2(a). An employer is not required to pay an employee for hours the employee is not required to be at his place of work by reason of holidays, vacation, lunch

hours, illness and similar reasons. N.J. ADMIN. CODE 12:56-5.2(b). Employees who reside on the employer's premises and work irregular and intermittent hours that make it unfeasible to account for the hours actually on duty may be compensated for not less than eight hours per day in lieu of other applicable provisions. N.J. ADMIN. CODE 12:56-5.3. An employee who reports for work at the employer's request must be paid for at least one hour at the applicable wage rate, except where the employer has made available to the employee the minimum number of hours agreed upon prior to commencement of work on that day. N.J. ADMIN. CODE 12:56-5.5.

- (ii) Time spent "on-call" need not be considered hours worked where employees are not required to remain on the employer's premises and are free to engage in their own pursuits subject only to leaving word where they can be reached. N.J. ADMIN. CODE 12:56-5.6. If such an employee does go out on an on-call assignment, only the time actually spent in making the call need be considered hours worked. N.J. ADMIN. CODE 12:56-5.6(a). However, if calls are so frequent or the on-call conditions so restrictive that the employee is not free to use the time for his own benefit, he "may be considered 'engaged to wait' rather than 'waiting to be engaged,'" and the waiting time shall be considered hours worked. N.J. ADMIN. CODE 12:56-5.6(b). On-call employees required to remain at home when their office is closed to receive telephone calls from customers, and enjoying long periods of leisure time to engage in normal activities, may be compensated pursuant to any reasonable agreement for determining the number of hours worked. N.J. ADMIN. CODE 12:56-5.7. Such an agreement must count not just the actual time spent answering calls, but must also make some allowance for the restriction on freedom involved with such an arrangement. Id.

2. How Does An Employer Calculate The Regular Rate of Pay For Overtime Purposes?

a. The Minimum Wage

(i) Federal Law

- (a) At minimum, the regular rate must equal the minimum wage. The federal minimum wage for covered, nonexempt employees is \$5.15 per hour.

In cases where an employee is subject to both federal and state minimum wage laws, the employee is entitled to the higher of the two wages. See U.S. Dep't of Labor, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited August 18, 2006).

(ii) New Jersey Law

- (a) The minimum wage for covered, nonexempt employees in New Jersey is \$6.15 per hour, and will be \$7.15 per hour effective October 1, 2006 as a result of legislation signed on April 12, 2005. 2005 N.J. Sess. Law Serv. 70. With the increase of the minimum wage, the minimum overtime rate will be an amount equal to \$9.23 (1.5 times \$6.15) and as of October 1, 2006 an amount equal to \$10.73 (1.5 times \$7.15). WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY, 2005 SUPPLEMENT 276 (Gregory K. McGillivray ed., ABA 2005) (2005).

b. Calculating the Regular Rate for Hourly Employees

(i) Federal Law

- (a) An hourly employee's regular rate is determined by dividing the total remuneration for employment in a workweek by the total number of hours worked. An employee's regular rate may be different from his or her hourly rate of pay.
- (1) The regular rate must include all remuneration for employment including shift differentials and commission payments. See Featsent v. City of Youngstown, 70 F.3d 900 (6th Cir. 1995) (holding that the city violated the FLSA by not including shift differential, hazardous duty pay, and non-discretionary bonuses in the regular rate).
- (2) The regular rate does not include reimbursement for expenses, premium payments for overtime, discretionary bonuses, gifts, sick or vacation pay, profit sharing, or pension or health benefit plan contributions made to third parties. 29 U.S.C. § 203(m); § 207(e); see Minizza v.

Stone Container Corp. Corrugated Container Div. E. Plant, 842 F.2d 1456 (3d Cir. 1988) (holding that lump sum contract ratification bonus payments are not part of wage base for purposes of calculating overtime). In addition, under certain circumstances when the statutory conditions are met, stock options are not included in an employee's regular rate. 29 U.S.C. § 207(e)(8).

(ii) New Jersey Law

(a) In accordance with federal law, New Jersey requires that overtime be paid for every hour worked in excess of forty hours per workweek. Specifically, an employee's "regular hourly wage" is defined as the amount that an employee is regularly paid for each hour of work, determined by dividing the total hours of work during the week into the employee's total earnings for the week, exclusive of overtime pay. N.J. STAT. ANN. § 34:11-56a1(e). Employees are entitled to overtime pay computed on the basis of a single given workweek; employee hours may not be computed or averaged over two or more workweeks. N.J. ADMIN. CODE 12:56-6.2. Even if an employee wants to work in excess of forty hours per week and will accept straight time for all hours worked, the employer must provide the employee overtime for all hours worked over forty. N.J. ADMIN. CODE 12:56-6.4(b).

(1) When an employee's pay includes gratuities, food, or lodging and it is not feasible to determine the regular hourly wage, the employer will fulfill its obligation if the overtime is paid in cash on the basis of a previously agreed-upon hourly wage. N.J. ADMIN. CODE tit. 12, § 56-6.7(b).

(2) The regular hourly wage does not include gifts, discretionary bonuses, sick or vacation pay, profit sharing, travel or other reimbursable expenses incurred for the employer's benefit and not made as compensation for employment, irrevocable employer contributions to employee welfare or pension plans, additional compensation

paid for hours worked in excess of eight per day or for work on weekends, holidays, or regular days of rest, and overtime compensation. N.J. ADMIN. CODE tit. 12, § 56-6.6(a).

c. Calculating the Regular Rate for Salaried Employees

(i) Federal Law

(a) If the employee is paid a weekly salary, his or her regular hourly rate of pay, on the basis of which time and one-half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. 29 C.F.R. § 778.113. For example, if an employee is hired at a salary of \$350 and if it is understood that this salary is compensation for a regular workweek of forty hours, the employee's regular rate of pay is \$350 divided by forty hours, or \$8.75 an hour. When he or she works overtime, he or she is entitled to receive \$8.75 for each of the first forty hours and \$13.13 ( $1\frac{1}{2} \times \$8.75$ ) for each hour thereafter.

(1) Where the salary covers a period longer than one workweek, such as one month, the salary must be reduced to its workweek equivalent. A monthly salary is converted to its equivalent weekly wage by multiplying by twelve and dividing by fifty-two. A semi-monthly salary is converted by multiplying by twenty-four and dividing by fifty-two. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular work day. However, in the face of a salaried employee's challenge, the resultant rate in such a case must not be less than the statutory minimum wage. 29 C.F.R. § 778.113.

(ii) New Jersey Law

- (a) If a salaried employee is not exempt from the overtime provisions, the employer is obligated to pay the employee overtime for his or her “regular rate” for “hours worked” in excess of forty hours during any workweek. WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY, 1233 (Gregory K. McGillivary ed., ABA 2004) (2004). The regular rate for salaried employees is computed in accordance with federal law. See, e.g., Albanese v. Bergen County, N.J., 991 F. Supp. 410, 422 (D.N.J. 1998) (citing 29 C.F.R. § 778.113 and explaining that the regular rate for a salaried employee solely employed on a weekly basis is computed by dividing the salary by the number of hours which the salary is intended to compensate); see also N.J. ADMIN. CODE 12:56-6.2 (“Overtime . . . shall be computed on the basis of each workweek standing alone.”).

d. Calculating the Regular Rate for Employees Who Earn Commissions

(i) Federal Law

- (a) Commissions are considered payments for hours worked and must be included in the regular rate, regardless of their source. This is true whether the commission is the sole source of the employee’s compensation or is paid in addition to a salary or an hourly rate. 29 C.F.R. § 778.117.

(ii) New Jersey Law

- (a) Employees are not required to be compensated on an hourly rate basis. Rather, their “earnings may be determined on a piece-rate, salary, bonus, commission or other basis, but the overtime compensation due to employees shall be paid on the basis of the hourly rate derived therefrom.” N.J. ADMIN. CODE tit. 12, § 56-6.5(b).

e. Employees Paid at Multiple Rates of Pay

(i) Federal Law

(a) If an employee works at two or more rates, his or her regular rate is the weighted average of the rates. Accordingly, the overtime compensation will reflect the hourly rates of the different jobs regardless of what job was performed on overtime. When an employee performs two or more different kinds of work, and has agreed with the employer that different rates will apply to the different kinds of work, the employer need not pay the employee at a rate of one and one-half times his or her “regular rate” for the overtime hours that this employee spends performing the “other” work as long as the overtime pay for those hours is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours. 29 U.S.C. § 207(g)(2); 29 C.F.R. § 778.419.

(1) Example: A hospital did not violate the FLSA by paying operating room personnel who were “on-call” during the night shift at one and one-half the federal minimum wage for the time they were not actually working during that shift, rather than at one and one-half times their normal daytime wages. Townsend v. Mercy Hosp., 862 F.2d 1009 (3d Cir. 1988). But see Reimer v. Champion Healthcare Corp., 258 F.3d 720 (8th Cir. 2000) (nurses on-call time not compensable where nurses not required to be at hospital and had few restrictions on their movement).

(ii) New Jersey Law

(a) New Jersey law does not directly address the issue of how to calculate the regular rate for employees who are paid at multiple rates of pay. Accordingly, New Jersey employers should follow federal law. WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY, 1233 (Gregory K. McGillivary ed., ABA 2004) (2004).

3. The Fluctuating Workweek (“FWW”)

a. Federal Law

(i) Where an employee’s hours fluctuate from week to week, an employer may reach a “mutual understanding” with an employee that the employee will receive a fixed salary for all the hours worked in a week, and an additional one-half of the employee’s regular rate for each overtime hour. 29 C.F.R. § 778.114(a). This FWW method of compensation is “an alternative means of complying with the overtime provisions of the FLSA, it is no exemption from those provisions.” Davis v. Friendly Express, Inc., No. 02-14111, 2003 WL 21488682, at \*3 n.4 (11th Cir. 2003); see also Bailey v. County of Georgetown, 94 F.3d 152, 154-55 n.5 (4th Cir. 1996) (noting that the FWW is an alternative method for computing the regular rate, not an exception).

(a) The FWW is authorized by the Department of Labor regulations governing the FLSA. 29 C.F.R. §778.114. Pursuant to the regulation and as interpreted by caselaw, the following conditions must be met to correctly use the FWW method: (1) the employee’s hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty during the week. See Teblum v. Eckerd Corp. of Florida, Inc., No. 2:03cv495FTM33DNF, 2006 WL 288932, at \*3 (M.D. Fla. Feb. 7, 2006) (citing 29 C.F.R. § 778.114; Davis, 2003 WL 21488682, at \*1; O’Brien v. Town of Agawam, 350 F.3d 279, 288 (1st Cir. 2003); and Griffin v. Wake County, 142 F.3d 712, 716 (4th Cir. 1998)).

(b) The key requirement is that the employee must understand the fixed amount covers all hours worked in a week, rather than a set number of

hours. Further, the employee must receive this salary regardless of whether the employee works a long or a short week. Id.

- (c) When computing the fifty percent (50%) overtime premium for hours over forty, the employer must use the employee's regular rate. The regular rate is determined by dividing the salary by the actual number of hours worked for the given week. The employee is then paid an extra one-half of the regular rate for each hour over forty hours. For example, if an employee is paid \$350 per week for all hours worked and the employee works forty-four hours in a week, his or her regular rate for that week is \$7.95 ( $\$350 / 44$  hours). The employer must pay the employee \$365.90 ( $\$350$  salary plus  $\$15.90$  (one-half  $\$7.95 \times 4$  hours overtime)). If the employee worked fifty hours, his or her regular rate for that week would be \$7.00 per hour ( $\$350 / 50$  hours). The employer would have to pay the employee \$385 ( $\$350$  salary plus  $\$35$  (one-half  $\$7.00 \times 10$  hours overtime)). Consequently, under the fluctuating workweek method, the greater the number of hours an employee works in a week, the lower his or her regular rate is for that week, and the less pay per overtime hour he or she receives. Monahan v. County of Chesterfield, Va., 95 F.3d 1263, 1280 (4th Cir. 1996); Condo v. Sysco Corp., 1 F.3d 599, 601-02 (7th Cir. 1993).
- (d) Courts have recognized several types of schedules as satisfying the requirement that the employees' workweek fluctuates. For example, in Flood v. New Hanover County, 125 F.3d 249 (4th Cir. 1997), the Fourth Circuit held that a nine-day regularly recurring cycle of 24.15 hours on-duty, 24 hours off-duty, 24.15 hours on-duty, 24 hours off-duty, 24.15 hours on-duty, followed by 96 consecutive hours off-duty was a fluctuating number of hours despite its regularly recurring nature. The court found the employer had properly reached an agreement with the employees and paid them pursuant to that agreement. See also Roy v. County of Lexington, S.C., 948 F. Supp. 529, 531 (D.S.C. 1996) (holding EMS employees schedule of 24.5 hours on-duty followed by 47.5 hours off-duty was a fluctuating number of hours), aff'd, 141 F.3d

533 (4th Cir. 1998). In Teblum, the court held that the employees' workweek fluctuated despite the fact that they always worked a minimum of fifty hours per week. Teblum, 2006 WL 288932, at \*5-6.

- (e) The FWW can also be applied to determine damages where overtime has not been properly paid. Specifically, many courts addressing the question have held that employees who were misclassified as exempt by their employers and who were told that they would not be paid overtime for hours worked in excess of forty had the required understanding for purposes of applying the fluctuating workweek calculation. See Valerio v. Putnam Assocs. Inc., 173 F.3d 35, 39 (1st Cir. 1999) (holding that employee misclassified by employer as exempt understood that her fixed weekly salary was to be compensation for potentially fluctuating weekly hours where employee understood that employer did not intend to provide overtime pay if she worked more than forty hours per week); Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138-39 (5th Cir. 1988) (holding that employee misclassified as exempt and employer agreed on a fixed salary for varying hours and applying fluctuating workweek method); Donihoo v. Dallas Airmotive, Inc., Civ. A. No. 3:97-CV-0109P, 1998 WL 47632, at \*6 (N.D. Tex. Feb. 2, 1998) (“[W]hen an employee is improperly classified as exempt, a formula based on the fluctuating workweek standard should be applied.” (citing Cox v. Brookshire Grocery Co., 919 F.2d 354 (5th Cir. 1990)); Bailey, 94 F.3d at 156 (“Neither [29 C.F.R. 778.114] nor the FLSA in any way indicates that an employee must also understand the manner in which his or her overtime pay is calculated.”); Tumulty v. FedEx Ground Package System, Inc., No. C04-1425P, 2005 WL 1979104, at \*4-5 (W.D. Wash. Aug. 16, 2005). But see Rainey v. Am. Forest & Paper Ass’n, 26 F. Supp. 2d 82, 100 (D.D.C. 1998) (holding that contemporaneous payment of overtime compensation is a necessary prerequisite for application of the fluctuating workweek method).

b. New Jersey Law

- (i) The New Jersey Department of Labor does not oppose a fixed pay fluctuating workweek method for calculating overtime. See, e.g., N.J. Dep't of Labor v. Pepsi-Cola Co., No. A-918-00T5, 2002 WL 187400, at \*96 (N.J. Super. Ct. App. Div. Jan. 31, 2002) (recognizing that New Jersey follows the federal fluctuating workweek method when threshold standards met).
- (ii) The Department of Labor, in a February 21, 2006 letter, signed by the Director, Division of Wage and Hour Compliance, confirmed its support for the use of the FWW method so long as affected employees are given prior notice of its use. See Letter from Michael P. McCarthy, Director, Division of Wage and Hour Compliance (Feb. 21, 2006) (on file with author).

B. The Overtime Exemptions: What Every Employer Must Know

1. General Discussion Of All Major Exemptions

a. Federal Law

- (i) The overtime provisions of FLSA do not apply to persons who are not employees (e.g. independent contractors) or who are exempted from coverage (“exempt” employees). Employees who earn certain levels of compensation and who are employed in a bona fide executive, administrative, or professional capacity are exempt (“white-collar” exemptions). There are also exemptions for persons employed as outside salespersons or computer systems analysts or programmers. 29 C.F.R. § 541.0-541.52.
- (ii) Some other exempt employees are:
  - (a) employees of certain seasonal amusement or recreational establishments;
  - (b) employees of certain small newspapers and switchboard operators of small telephone companies;
  - (c) seamen employed on foreign vessels;
  - (d) employees engaged in fishing operations;
  - (e) employees engaged in newspaper delivery;

- (f) farmworkers employed on small farms (i.e., those that used less than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year);
- (g) casual babysitters and persons employed as companions to the elderly or infirm;
- (h) certain commissioned employees of retail or service establishments;
- (i) auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- (j) auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- (k) railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans;
- (l) announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations;
- (m) domestic service workers who reside in their employers’ residences;
- (n) employees of motion picture theaters; and,
- (o) farmworkers.

29 U.S.C. § 213.

b. New Jersey Law

- (i) Employees exempt from overtime include:
  - (a) any individual employed in a bona fide executive, administrative or professional capacity;
  - (b) outside salespeople;
  - (c) employees subject to applicable wage orders;

- (d) employees of common carriers of passengers by motor bus (which does not include taxi cab drivers);
- (e) limousine drivers who are employed by an employer engaged in the business of operating limousines;
- (f) employees of a summer camp operated by a non-profit or religious association during the months of June, July, August and September; and,
- (g) employees engaged in labor relative to raising or care of livestock.

N.J.S.A. 34:11-56a4.

## 2. Discussion Of The Salary Basis Test

### a. Federal Law

- (i) To qualify for the professional, executive, and administrative exemptions, an employee must be paid on a “salary basis.”
  - (a) Generally, an individual is paid on a salary basis if he “regularly receives...on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation...not subject to reduction because of variations in the quality or quantity of the work performed.” See 29 C.F.R. § 541.602.
- (ii) Beware of Impermissible Deductions For Exempt Employees
  - (a) The “no pay docking” rule prohibits, with a few specified exceptions, any reduction in compensation because of variations in the quality or quantity of work performed, and requires payment of a full week’s salary for any week in which the employee performs work. An employer who improperly docks pay from an exempt employee runs the risk of causing that employee to lose his or her exempt status.
    - (1) There are seven exceptions from the “no pay docking” rule. Employers may deduct from an employee’s pay for: (1) absences for one

or more full days for personal reasons; (2) absences for one or more full days for sickness or disability if the deductions are made pursuant to a bona fide plan, policy or practice; (3) offsets for payments for jury fees, witness fees, or military pay; (4) penalties imposed in good faith for violating safety rules of major significance; (5) disciplinary suspensions imposed in good faith of one or more full days for violations of workplace conduct rules (such as a violation of a sexual harassment policy); (6) proportionate amount of salary deducted for days worked during the employee's first and last weeks of employment; and (7) partial-day deductions for absences that qualify under the Family and Medical Leave Act. 29 C.F.R. § 541.602.

- (b) If any deduction was made because of absences caused by the employer, or because there is no work available, the individual would not be considered a salaried employee. 29 C.F.R. § 541.602(a). If no work is performed in a given week, no salary need be paid. Id.
- (c) If any deduction in pay was made for fractional work days missed due to sickness, accident, or personal reasons, the salary basis test would not be met. 29 C.F.R. § 541.602(b)(2).
- (d) Deductions can be made if the "exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability." 29 C.F.R. § 541.602(b)(1).
  - (1) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. 29 C.F.R. § 541.602(b)(2). The exemption is not lost if the plan did not in fact compensate the individual, as long as the individual either

had not yet qualified for participation in the plan or had exhausted his or her leave allowance under the plan. Id.

- (e) Section 102(c) of the FMLA expressly provides that where an employee is otherwise exempt from the FLSA's minimum wage and overtime requirements, compliance by an employer with the FMLA's requirement to provide unpaid leave shall not affect the exempt status of the employee under FLSA. 29 U.S.C. § 2612(c).
- (f) Deductions for absences caused by jury duty, attendance as a witness, or temporary military leave are not allowable deductions from salary; however, any remuneration received for such services could be offset against the salary for the workweek for which it was paid. 29 C.F.R. § 541.602(b)(3). When an employee is out of work for a full week for one of these reasons, no salary need be paid for that week. Quirk v. Baltimore Cty., 895 F.Supp. 773, 782 (D. Md. 1995).
- (g) Several courts have held that unpaid suspensions for less than major infractions result in a loss of exempt status. See, e.g., Klein v. Rush-Presbyterian-Saint Luke's Med. Ctr., 990 F.2d 279, 284-85 (7th Cir. 1993).
- (h) Pay in addition to salary, such as holiday pay, does not result in a loss of the exemption. Courts have held that paying extra pay or overtime pay to employees beyond their regular salaries does not defeat exempt status. See, e.g., Wright v. Aargo Security Servs., Inc., No. 99 Civ. 9115, 2001 WL 91705, at \*5 (S.D.N.Y. Feb. 2, 2001).
- (i) Payment of a commission in addition to salary does not violate the salary prong "if the employment arrangement also includes a guarantee of at least \$455 each week paid on a salary basis." 29 C.F.R. § 541.604(a).
- (j) Related to salary deductions is whether adjustments to an employee's "leave bank" or accrued leave for partial day absences would defeat exempt status. Although no deduction from salary could be made

for fractional days missed, deductions from “fringe benefits” appear to be allowed.

- (1) In Barner v. City of Novato, the Ninth Circuit Court of Appeals held that deductions from employee paid leave banks for absence of less than one day did not constitute an impermissible deduction from salary as defined by the DOL’s regulations. 17 F.3d 1256, 1261 (9th Cir. 1994); see also Vogel v. American Home Prods. Corp. Severance Pay Plan, No. 96-2674 1997 WL 577578, at \*5 (4th Cir. Sept. 17, 1997) (unpublished) (holding employer’s policy of limiting employees’ use of vacation to half days on Fridays during the summer was not a deduction from salary and further vacation is not salary); Kuchinskas v. Broward Cty., 840 F. Supp. 1548, 1555-56 (S.D. Fla. 1993) (holding leave banks are not salary and any reductions do not negate exempt status), aff’d, 86 F.3d 1168 (11th Cir. 1996); Int’l Ass’n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230, 1232 (E.D. Va. 1989) (finding personal leave, sick leave, and compensatory leave are part of an employee’s compensation but are not salary); Dinsmore v. Madonna Centers, Inc., 131 Lab. Cas. (CCH) ¶ 33, 297 (Neb. Ct. App. 1995) (finding reductions in accrued compensatory leave did not defeat salaried status but holding the exemption was lost because an express written policy that disallowed negative balances in leave bank showed employee salaries would be reduced).
- (2) In a letter dated April 14, 1992, the DOL said: “Where an employer has bona-fide sick leave and vacation pay benefit plans, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives

in payment an amount equal to his or her guaranteed salary.” Daily Lab. Rep. (BNA) No. 188, at E-1 (Sept. 29, 1997).

- (3) In another letter dated April 1993, the DOL said: “Where an employee has exhausted these [sick and vacation] benefits, deductions may be made in increments of full days only for absences for personal reasons or illness. Deductions from the salaries of otherwise exempt employees for partial day absences after they have exhausted their vacation or sick time benefits have never been permitted under the Regulations....”
- (k) Employers will jeopardize the exempt status of their employees only if they have an “actual practice” of making improper deductions. 29 C.F.R. § 541.603(d). This is referred to as the safe harbor provision, and employers may avail themselves of the safe harbor provision if they satisfy certain conditions:
- (1) First, employers must clearly communicate a policy prohibiting improper pay deductions. Although a written policy is not required, the best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions. The policy can be distributed, for example, by providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer’s Intranet.
  - (2) Second, the policy must provide a complaint procedure that an employee may use to report improper deductions.
  - (3) Third, if the employer makes an inadvertent improper deduction, it must reimburse employees for the improper deduction and make a good faith commitment to comply with the FLSA no docking rules in the future.

- (4) Finally, if the employer “willfully” violates the policy by continuing to make improper deductions following a complaint, the employer will lose its exempt status for all employees in the same job classification working for the same managers responsible for the improper deductions for the time period in which the improper deductions were made.

b. New Jersey Law

- (i) New Jersey follows federal law with respect to the salary basis test, except with respect to the minimum salary level. The federal regulations require a minimum salary level of \$455/week, while New Jersey continues to require a minimum salary level of \$400/week. N.J. ADMIN. CODE tit. 12, §56-7.1(a)(6), N.J. ADMIN. CODE tit. 12, §56-7.2(a)(5), N.J. ADMIN. CODE tit. 12, §56-7.3(a)(5).

- (ii) New Jersey generally follows federal law with respect to deduction of wages for exempt employees.

- (a) “The Secretary of Labor’s interpretation, adopted by the Supreme Court, states that exempt status will be denied only ‘when employees are covered by a policy that permits disciplinary or other deduction in pay ‘as a practical matter...the ‘standard is met...if there is either an actual practice of making such deduction or an employment policy that creates a ‘significant likelihood’ of such deductions. Finally, there must be ‘a clear and particularized policy-one which ‘effectively communicates’ that deductions will be made in specified circumstances.” Balgowan v. State of New Jersey, 115 F.3d 214 (3d Cir. 1997) (citing Auer v. Robbins, 519 U.S. 452 (1997)).

- (1) In Balgowan, the plaintiffs (Department of Transportation (“DOT”) engineers) claimed that their employer violated FLSA by failing to pay them overtime; they claimed that their wages were subject to reduction under the DOT’s disciplinary policy, and therefore, they were not exempt employees. Id. at 216. The court held that the engineers qualified for the professional exemption

under FLSA. Id. at 219. The court focused on the nonenforcement of the disciplinary policy and the fact that no engineer has had a pay reduction due to the policy. Id. The court held that there was not an actual practice of making such deductions or a significant likelihood that such deductions would occur; therefore, the court held that the policy did not justify overtime pay for the engineers. Id.

### 3. Discussion Of Professional, Computer, Executive And Administrative Exemptions

#### a. Federal Law

(i) The DOL amended the professional, executive, and administrative exemption regulations on August 23, 2004.

#### (ii) Learned Professional Exemption

(a) An employee is exempt under the learned professional exemption if:

(1) he/she is compensated on a salary basis at a rate of not less than \$455/week; and

(2) his or her primary duty is “the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.” 29 C.F.R. § 541.300.

(b) The exemption does not apply to employees who acquired their advanced knowledge through a combination of intellectual instruction and work experience. 29 C.F.R. § 541.301.

#### (c) Examples of learned professionals

(1) The phrase “field of science or learning” is meant to include the traditional professions of law, medicine, theology, accounting, engineering, teaching, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in

some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning. 29 C.F.R. § 541.301(c).

(iii) Creative Professional Exemption

(a) An employee is exempt under the creative professional exemption if:

- (1) he/she is compensated on a salary basis at a rate of not less than \$455/week; and
- (2) his or her primary duty is “the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” 29 C.F.R. § 541.300.

(b) Examples of creative professionals

- (1) The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. 29 C.F.R. § 541.302.

(iv) Computer Professional Exemption

(a) An employee is exempt under the computer professional exemption if he/she is compensated on a salary basis at a rate of not less than \$455/week (or on an hourly basis at a rate not less than \$27.63/hour) and his/her primary duty consists of:

- (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

- (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - (4) a combination of the aforementioned duties, the performance of which requires the same level of skills. 29 C.F.R. § 541.500.
- (b) In Martin v. Indiana Michigan Power Co., the court held that the plaintiff, an Information Technology (IT) Support Specialist, was not a computer professional, and therefore, was entitled to overtime pay. 381 F.3d 574, 581 (6th Cir. 2004). The plaintiff's primary responsibilities were: "[m]aintaining the computer workstation software, troubleshooting and repairing, and network documentation." Id. at 576. "Maintaining the computer system within the predetermined parameters does not require 'theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.'" Id. at 581. Therefore, the court held that the plaintiff's primary duties did not classify him as a computer professional, and thus, an exempt employee. Id.
- (c) In Bagwell v. Florida Broadband, LLC, the court held that the plaintiff, a Network Operation Engineer, fell under the computer professional exemption. 385 F. Supp. 2d 1316, 1328 (S.D.Fla. 2005). The plaintiff's primary duty was to develop, improve, and make the defendant's network system function reliably. Id. at 1327. Many of the plaintiff's duties indicated that he was involved in the types of activities that qualify an employee as a computer professional. Id. Therefore, the court held that he was an exempt employee and was not entitled to overtime pay. Id. at 1328.

(v) Executive Exemption

(a) An employee is exempt under the executive exemption if:

- (1) he/she is compensated on a salary basis at a rate of not less than \$455/week;
- (2) his/her primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) he/she customarily and regularly directs the work of two or more employees; and
- (4) he/she has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100.

(b) Concurrent Duties

(1) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption. See, e.g., Smith v. Heartland Auto. Servs. Inc., 404 F. Supp. 2d 1144, 1148 (D. Minn. 2005).

- i) In Smith, the court held that an employee who spends less than fifty percent of his time on managerial duties can still be an exempt employee if management is his primary duty. Id. at 1152. In determining whether an employee's primary duty is management, in addition to time spent on managerial tasks, the court considered: "(1) the relative importance of the managerial duties as compared with other types of duties; (2) the frequency of the employee exercising discretionary powers; (3) the employee's relative

freedom from supervision; and (4) the ‘relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the [exempt employee].’” Id. at 1148.

(vi) Administrative Exemption

(a) An employee is exempt under the administrative exemption if:

- (1) he/she is compensated on a salary basis at a rate of not less than \$455/week;
- (2) his or her primary duty “is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and
- (3) his or her “primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200.

(b) The regulations contain a new provision, titled “Administrative Exemption Examples,” which makes clear that the following types of employees are generally exempt under the administrative exemption, provided they perform appropriate administrative duties: insurance claims adjusters, employees in the financial services industry, project leaders or managers, executive assistants to high-level executives, human resource managers; and purchasing agents. 29 C.F.R. § 541.203.

(vii) Exemption For Highly Compensated Employees

(a) The regulations contain a rule for “highly-compensated” workers 29 C.F.R. § 541.601.

(b) A highly-compensated employee is deemed exempt under Section 13(a)(1) if:

- (1) the employee earns total annual compensation of at least \$100,000, which

must include at least \$455 per week paid on a salary basis;

- (2) the employee's primary duty includes performing office or non-manual work; and
- (3) the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee. 29 C.F.R. § 541.601.

b. New Jersey Law

(i) New Jersey did not adopt the 2004 amendments to the professional, administrative, and executive exemption regulations. Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 320 (App. Div. 2005). "The federal regulations were recently amended...To date, no conforming amendments have been proposed in New Jersey." Id.

(ii) Professional Exemption

(a) A "professional employee" for the purpose of exemption from overtime under the Wage and Hour Law is an employee:

(1) whose primary duty consists of the performance of work:

- i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or
- ii) which [is] original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), or the result of which depends primarily

on the invention, imagination or talent of the employee; or

iii) which requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided under the federal regulations in 29 C.F.R. § 541.303; and

(2) whose work requires the consistent exercise of discretion and judgment in its performance; and

(3) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized to a given period of time; and

(4) who devotes less than 20 percent of his or her workweek to non-exempt work; and

(5) who is compensated for his or her services on a salary or fee basis, exclusive of gratuities, board, lodging or other facilities at a rate of not less than \$400 per week. N.J.A.C. 12:56-7.3(b).

(iii) Executive Exemption

(a) An executive under the New Jersey law is defined as an employee:

(1) whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and

- (2) who customarily and regularly directs the work of two or more other employees therein; and
- (3) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change in status of other employees will be given particular weight; and
- (4) who customarily and regularly exercises discretionary powers; and
- (5) who devotes less than 20 percent of his or her workweek to non-exempt work or less than 40 percent if employed by a retail or service establishment, provided that in either case he or she retains his or her role as manager and supervises two or more full time employees; and
- (6) who is compensated for his or her services on a salary basis exclusive of gratuities, board, lodging or other facilities, at a rate of not less than \$400 per week. N.J.A.C. 12:56-7.1(a).

(b) Employees with a bona fide equity interest in the enterprise of 20 percent or more are also considered executives under the regulations. N.J.A.C. 12:56-7.1(b). Employees training to be executives and not actually performing the duties of an executive are not exempt executives. N.J.A.C. 12:56-7.1(c).

(iv) Administrative Exemption

- (a) An “administrative employee” is an employee:
  - (1) whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer’s customers; and

- (2) who customarily and regularly exercises discretion and independent judgment; and
  - (3) who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or who executes under only general supervision special assignments and tasks; and
  - (4) who devotes less than 20 percent of his or her work to non-exempt work or less than 40 percent if employed by a retail or service establishment; and
  - (5) who is compensated for his or her services on a salary or fee basis, exclusive of gratuities, board, lodging or other facilities at a rate of not less than \$400 per week.  
N.J.A.C. 12:56-7.2(a).
- (b) Employees whose total compensation satisfies the salary test set out above, whose primary duty consists of sales activity, and who received at least 50 percent of their total compensation from commissions, are also deemed administrative employees under the regulations. N.J.A.C. 12:56-7.2(b).