



#OvertimeRules

What the new overtime rules mean to YOU!

Andrew Shipp

936-553-0920

ashipp@shipplawfirm.com



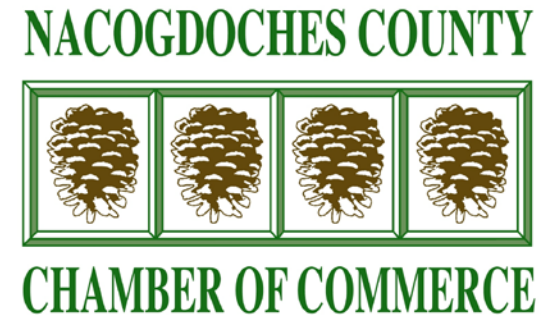
Polly Etta
Sunda

936-569-5918

psunda@axleyrode.com

A&R
AXLEY & RODE, LLP
www.axleyrode.com

Thank you, Sponsors!



Disclaimer

The information and opinions presented today should not be considered legal or accounting advice for your particular business situation or needs. Each situation is different and must be thoroughly evaluated based upon its own unique circumstances.

It may be advisable to conduct reviews under the protection of the attorney-client privilege.



What is the FLSA?

- Minimum Wage
- Overtime
- Subject to Exemptions

Application of FLSA

- Enterprise coverage: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections; and
- Individual coverage: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections

Enterprise Coverage

- Annual Dollar Volume is \$500,000 or more

OR

- Two or more employees engaged in Interstate Commerce

OR

- Named Enterprise
 - hospitals, organizations providing medical or nursing care for residents, schools, preschools, and government agencies

Individual Coverage

Includes workers who are engaged in:

- Interstate commerce or the production of goods for interstate commerce
- Domestic service—including home care

Bottom Line

You should assume that the FLSA applies to you and your company.



Minimum Wage

- Covered, nonexempt employees must be paid no less than the federal minimum wage for all hours worked
- \$7.25 per hour
- Cash or equivalent

Minimum Wage

- Compensation Included
- Deductions
- Tipped Employees
- Hours Worked

Overtime

Overtime

- Covered, nonexempt employees must be paid one and one half times the regular rate of pay for all hours worked over forty in a workweek
- Each workweek stands alone
- Regular rate
 - Exclusions
 - Payments other than hourly rates
- Deductions

Workweek

- Workweek is 7 consecutive 24 hour periods (168 hours)
- Does not have to be a typical calendar week

Regular Rate

- Determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage

Regular Rate Exclusions

- Sums paid as gifts
- Payment for time not worked
- Reimbursement for expenses
- Discretionary bonuses
- Profit sharing plans
- Retirement and insurance plans
- Overtime premium payments
- Stock options



Regular Rate Calculation

Step 1: Total Straight Time Earnings (minus statutory exclusions) divided by

total hours worked = Regular Rate

Step 2: Regular Rate x .5 = Half Time Premium

Step 3: Half Time premium x Overtime Hours
= Total Overtime Premium Due



Exemptions

- White Collar Exemptions
 - Executive Employees
 - Administrative Employees
 - Professional Employees
 - Outside Sales Employees
 - Computer Employees
 - Highly Compensated Employees
- Retail Establishment Exemptions



Poll: Which Exemptions are you currently using?

- White Collar Exemptions
 - Executive Employees
 - Administrative Employees
 - Professional Employees
 - Outside Sales Employees
 - Computer Employees
 - Highly Compensated Employees
- Retail Establishment Exemptions

White Collar Exemptions

- Salary Basis Test
- Salary Level Test
- Job Duties Test

New Overtime Rule

- Effective December 1, 2016
- Salary Level Increases
- Nondiscretionary Bonuses
- Automatic Updates



Salary Basis Test

Salary Basis Test

- Predetermined amount of compensation
- Cannot be reduced because of variations in quality or quantity of work performed
- Need not be paid for workweek when work not performed

Permitted Salary Deductions

1. Absence from work for personal reasons
2. Absence due to sickness if made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. Offset any amounts received as payment for jury fees, witness fees, or military pay
4. Penalties imposed in good faith for violating safety rules of major significance

Permitted Salary Deductions

5. Unpaid disciplinary suspension imposed in good faith for violation of written workplace conduct rules
6. Proportionate part of full salary paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act (FMLA)

Effect of Improper Deductions

- Actual practice of making improper deductions will result in loss of the exemption
- Isolated or inadvertent improper deductions will not result in loss of exemption, if employee is reimbursed
- Safe Harbor: Employer
 - Has a clearly communicated policy prohibiting improper deductions and a complaint mechanism
 - Reimburses employee
 - Makes GF commitment to comply in future

Salary Level Test

Salary Level Test

- Standard Salary level- pursuant to 29 CFR 541.600
 - Current: \$455 per week (\$23,660 per year)
 - New: \$913 per week (\$47,476 per year)
- Highly Compensated Employee (HCE)- pursuant to 29 CFR 541.601
 - Current: \$100,000 per year
 - New: \$134,004 per year



Minimum Salary Level

- For most employees, minimum salary level will be \$913 per week
- May be paid in equivalent amounts for periods longer than one week
 - Biweekly: \$1,826
 - Semimonthly: \$1,978.16
 - Monthly: \$3,956.33



Nondiscretionary Bonuses

- Promised in advance to employees (e.g. bonuses for meeting production goals, retention bonuses, commission payments based on fixed formula)
- May be used to satisfy up to 10% of the standard salary level
 - Minimum of 90% (approx. \$822) must be paid as a weekly salary
- Payments for Nondiscretionary bonuses must be paid quarterly or more frequently

Catch-up Payments

- Must be made within one pay period of the end of the quarter
- Catch-up payment counts only towards prior quarter's salary amount

Automatic Updates

- Updates every three years beginning in 2020



Highly Compensated Employees

- Earns annual compensation of \$134,004 or more
- Primary duty includes performing office or non-manual work
- Customarily performs at least one of the exempt duties of an exempt executive, administrative, or professional employee



Standard Duties Test

Standard Duties Test

- Executive
- Administrative
- Professional



Executive Duties

- Primary duty must be managing the enterprise, or managing the customarily recognized department or subdivision of the enterprise
- AND managing two (2) full time employees
- Authority to hire or fire, or make recommendations as to the change of status of other employees
- 20% Owner executive actively engaged in the management of the enterprise



Administrative Duties

- Primary duty must be 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- BE CAREFUL, This is where many of the classification errors are made

Professional Duties

- 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
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

Computer Related Occupations

- Primary duty:
 - Systems analysis, consulting with users to determine system specifications
 - Design/development of computer systems
 - Design/development of computer programs related to machine operating systems
- AND:
 - Guaranteed salary of \$913 per week, or
 - Hourly rate of not less than \$27.63

Outside Sales

- Primary duty is making sales or obtaining orders or contracts for services or facilities for consideration paid by customers AND
- Customarily and regularly engaged away from the employer's place of business
- No compensation test

Overtime Exemption for Retail Commissioned Sales Employees

- Employed by a retail or service establishment
- More than half the employee's total earnings represent commission on goods or services
- Total compensation divided by number of hours worked (regular rate) must exceed one and one half times the minimum wage (\$10.88)

Retail Establishment

- 75% of whose annual dollar volume of sales is not for resale
- Recognized as a retail establishment in its particular industry

Now What?

Now What?

- Evaluate your employees & how you pay them
 - Do they meet the salary test?
 - Do they meet the duties test



Minimum Salary Test not met?

- Increase Salary
- Reduce hours to eliminate overtime
- Reclassify as non-exempt and pay overtime

Salary Test Not Met: Keeping on Salary

- Employee works less than 40 hours – pay the base salary
- Employee works more than 40 hours – calculate & pay overtime

Salary Test Not Met: Keeping on Salary

Base Pay \$480 & worked 50 hours

$\$480 / 50 \text{ hours} = \9.60 per hour

OT = $\frac{1}{2}$ the hourly rate for 10 hrs

Total Pay for the Week:

$\$480 + (10 * \$4.80) = \$528$

Base Pay \$480 & worked 60 hours

$\$480 / 60 \text{ hours} = \8.00 per hour

OT = $\frac{1}{2}$ the hourly rate for 20 hrs

Total Pay for the Week:

$\$480 + (20 * \$4.00) = \$560$



Salary Test Not Met: Move to Hourly

- Divide weekly salary by the number of hours they work
 - \$480 per week base salary & they consistently work 50 hours week
 - $\$480 / 50 \text{ hours} = \9.60
- Pay overtime at time and half for hours over 40



Salary Test Not Met: Move to Hourly

- Divide weekly salary by the number of hours they work
 - \$480 per week base salary & they consistently work 50 hours week
 - $\$480 / 50 \text{ hours} = \9.60
- Pay overtime at time and half for hours over 40

Salary Test Not Met: Move to Hourly

Employee worked 50 hours

$$40 \text{ hrs} * \$9.60 = \$384.00$$

$$10 \text{ hrs} * \$14.40 = \$144.00$$

Total Pay for the Week:

$$\$384 + \$144 = \$528$$

Employee worked 60 hours

$$40 \text{ hrs} * \$9.60 = \$384.00$$

$$20 \text{ hrs} * \$14.40 = \$288.00$$

Total Pay for the Week:

$$\$384 + \$288 = \$672$$



Duties Test Not Met – Must Pay Overtime

- Continue paying salary
 - Employee works less than 40 hours – pay the base salary
 - Employee works more than 40 hours – calculate & pay overtime
- Convert to hourly rate

Things to Consider

- When making your decision, be sure to treat classes the same
 - Watch for discrimination
- You can determine your work week (7 day period)
- Consider fringe benefits – insurance, retirement
- Have a written policy

Non-Compliance

- Pay back wages owed to employees
- Civil money penalties
- Attorney fees
- Owners can be held personally liable



Questions?