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FYI



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WAGE AND HOUR

Salespersons – Pay Practices

Summary:

Salespeople covered by the Fair Labor Standards Act (FLSA) are non-exempt employees who must be paid minimum wage and overtime for all hours worked over 40 in a workweek, regardless of how the employee is paid,. Commissioned salespeople, as a category of employees, are not exempt from overtime unless a specific exemption is met as outlined in Section IV of this FYI bulletin.

Other Resources Available on This Subject:

Training Programs:

Wage and Hour Workshop

Publications:

FYI: Wage and Hour: Hours of Work

Important Notice

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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I. Meeting Minimum Wage for Salespeople

- A. The most common methods of paying salespeople are:
1. Straight salary or hourly rate - a fixed sum is paid weekly, bi-weekly, semi-monthly, monthly or a fixed amount is paid for each hour worked.
 2. Salary-plus-commission - commission on all sales in addition to base salary.
 3. Quota bonus - commission is paid on sales above a fixed sales quota, often using the salary-plus-commission as the base method.
 4. Straight commission without advance - a flat percentage is paid on each dollar of sales.
 5. Straight commission with advance, draw or guarantee - at regular intervals, the employee is paid any additional amount by which the commissions exceed sums previously paid as draw, advance or guarantee.
- B. A salesperson must be paid the minimum wage for all hours worked in the workweek regardless of the method of compensation or whether sales are made.
1. Commission salespeople, as a category of employees, are not exempt from the FLSA overtime and minimum wage requirements. Some retail employers, having heard of the overtime exemption for which an individual salesperson may qualify, have mistakenly received the impression that all commission salespeople are exempt as a class. This is not so.
 2. Incentive earnings, commissions, bonuses, draw and contest prizes as well as the hourly wage and salary are all included in the regular rate of pay for the purposes of calculating the required minimum hourly wage and overtime pay.
 3. For purposes of meeting the minimum wage, commission earnings must be net commission earnings, after deducting returns, allowances, repossessions or similar charge backs.
 4. The employer may not average wages over a period longer than a workweek to meet the minimum wage requirement. Further, the employer may not deduct commission earned in a subsequent week to offset any minimum wage payment made in an earlier week.
 5. The employer may credit the commissions at the time of sale, when credit is approved, on delivery or whatever system determined by the business. If the employer is unable to calculate the commission until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the regular rate. Later when the commission is computed, the employer must apportion back or spread the commission over the workweeks during the period in which it was earned and recomputed overtime when necessary.

II. Hours Worked by Nonexempt Salespeople

- A. In general, time spent by salespeople in training meetings related to their job counts as hours worked. This includes sales meetings or lectures where such meetings are intended to improve sales, whether attendance is compulsory or not, and even if held outside regular work hours.
- B. If a salesperson leaves the store and goes to a customer to make a sale, the travel time and time spent making the sale are considered hours worked.
- C. For further information concerning hours of work to include travel time, see MSEC FYI publication entitled, "Travel Time Pay."

III. Computing Overtime Pay for Nonexempt Salespeople

- A. Similar to other nonexempt employees, overtime pay must be calculated for all salespeople who work more than 40 hours in a workweek, unless the employee is exempt from overtime as described under Section IV of this outline.
 - 1. Commissions are considered payment for hours worked and must be included in the employee's regular rate regardless of what method is used to calculate the commission or when it is paid. Even if the minimum wage requirement is more than met, the commission payment must be added to the regular rate for the purpose of calculating the overtime pay.
 - 2. The employer is not excused from including the commission payment in the regular rate calculation to compute overtime just because the commission is not paid until sometime after the normal payday.
- B. If the commission is earned on a workweek basis, the regular rate is calculated by adding the commission to all other earnings (hourly wage, salary, incentive bonus) for the workweek and dividing by the total number of hours worked in the workweek. Since the commission is payment for all hours worked, the overtime pay is an additional ONE-HALF THE REGULAR RATE for each hour worked over 40 in the workweek. See Example 1.

EXAMPLE 1**Commission Only**

Hours worked in workweek = 49 (9 overtime hours)

Commission earned in one week = \$327.22

Regular Rate:

$$\begin{aligned} &\text{Commission earned in week} \div \text{hours worked} \\ &\$327.22 \div 49 = \$6.68 \end{aligned}$$

Overtime Pay:

$$\begin{aligned} &(\text{Regular Rate} \div 2) \times \text{Overtime hours} \\ &\$3.34 \times 9 = \$30.06 \end{aligned}$$

Total earnings: Commission + Overtime pay

$$\$327.22 + \$30.06 = \$357.28$$

Hourly Rate Plus Commission

Hours worked in workweek = 48 (8 overtime hours)

Commission earned in one week = \$17.50

Hourly Rate = \$6

Hourly wages for week:

$$\begin{aligned} &\text{Hourly Rate} \times \text{Hours Worked} \\ &\$6 \times 48 = \$288 \end{aligned}$$

Regular Rate:

$$\begin{aligned} &(\text{Commission} + \text{Hourly Wages}) \div \text{Hours Worked} \\ &(\$17.50 + \$288.00) \div 48 = \$6.36 \end{aligned}$$

Overtime Pay:

$$\begin{aligned} &(\text{Regular Rate} \div 2) \times \text{Overtime Hours} \\ &(\$6.36 \div 2) \times 8 = \$3.18 \times 8 = \$25.44 \end{aligned}$$

Total Earnings:

$$\begin{aligned} &\text{Commission} + \text{Hourly Wages} + \text{Overtime Pay} \\ &\$17.50 + \$288.00 + \$25.44 = \$330.94 \end{aligned}$$

- C. If commissions are deferred until after the regular payday because they cannot be determined until later, the commission earnings may be temporarily disregarded in calculating the regular rate until the employer is able to ascertain the amount of commission. In the meantime, the employer must still pay overtime using the known regular rate, excluding commissions.
1. Later, when the commission is paid for a particular workweek, the employer must recompute the regular rate adding in the commission and pay the additional overtime due the employee. See Example 2.

EXAMPLE 2

Hours worked: 50
 Weekly earnings: \$300 plus undetermined commission

Regular Rate: $\$300 \div 50 = \6
 Overtime Pay: $(\$6 \div 2) \times 10$ overtime hours = \$30
 Total Earnings: $\$300 + \$30 = \$330$

One month later, the employer pays \$200 in commission (all the commission was earned in one week). The employer must now add the commission to the compensation paid in that workweek and adjust the regular rate.

Regular Rate: $(\$300 + 200) \div 50 = \10
 Overtime Pay: $(\$10 \div 2) \times 10$ hours = \$50
 Additional Overtime Due: $\$50 - \30 already paid = \$20

or

Additional Regular Rate: Commission \div Hours Worked
 $\$200 \div 50 = \4

Overtime Due on Commission: $(\$4 \div 2) \times 10$ overtime hours = \$20

- D. Sometimes an employer will not be able to allocate a commission to a particular workweek or the employer may find it impractical to allocate the commission among the workweeks. For example, sales of big-ticket items vary so greatly from week to week that the one-week period is not a fair measure of a salesperson's regular rate.
1. Generally, an employer will wish to allocate equal amounts of a commission to each week. However, situations may arise when an employer will find it inappropriate to assume equal commission earnings for each workweek and will

want to assume that the salesperson earned an equal amount of commission in each hour worked.

2. The Wage and Hour Division has stated employers may choose between two alternative methods: allocate equal amounts of commission to each week or allocate equal amounts to each hour worked.
 - a. Allocating equal amounts of commission to each workweek - For a commission period of one month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. See Example 3. If there is a semi-monthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every four weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

EXAMPLE 3

Hours Worked in work week = 48

Hourly Rate = \$6

Hourly Wages for week = $\$6 \times 48 \text{ hours} = \288

Commission earned in one month = \$500

Commission per week:

Commission \times 12 months \div 52 weeks

$(\$500 \times 12) \div 52$

$\$6,000 \div 52$

\$115.38

Regular Rate:

(Hourly Wages + Commission) \div Hours Worked

$(\$288 + \$115.38) \div 48 = \$8.40$

Overtime Pay:

(Regular Rate \div 2) \times Overtime Hours

$(\$8.40 \div 2) \times 8$

$\$4.20 \times 8 = \33.60

Total Earnings:

Hourly Wages + Commission for the week + Overtime Pay

$\$288 + \$115.38 + \$33.60 = \436.98

- b. Allocating equal amounts of commission to each hour worked - Divide the amount of commission payment by the number of hours worked in the period to obtain the amount of increase in the regular rate allocable to the commission payment. See Example 4.

EXAMPLE 4

Hours worked per week = 48

Hourly rate = \$6

Hourly wages for week:

$$\$6 \times 48 \text{ hours} = \$288$$

Commission earned in four weeks = \$500

Hours worked in 4 week period:

$$48 \text{ hours per week} \times 4 \text{ weeks} = 192 \text{ hours}$$

Commission per hour: Commission \div hours in period.

$$\$500 \div 192 = \$2.60$$

Regular Rate: Hourly Rate + Commission Hourly Rate

$$\$6.00 + 2.60 = \$8.60$$

Overtime pay: (Regular Rate \div 2) \times Overtime Hours

$$(\$8.60 \div 2) \times 8 = \$34.40$$

Total earnings for week:

(Regular Rate \times Hours Worked) + Overtime Pay

$$(\$8.60 \times 48) + \$34.40 = \$447.20$$

IV. Exemptions from Overtime for Salespeople

- A. The Outside Sales Exemption allows an outside salesperson to be exempt from overtime and minimum wage requirements. There is no salary requirement for outside sales employees, i.e., no minimum wage requirement. While the outside sales exemption is often referred to as one of the white collar exemptions, the exempt outside salesperson need not be paid on a salary basis like employees exempt under the executive, administrative, professional and computer related professional exemptions.¹ Hence, exempt outside sales employees may be paid in any manner

¹ 29 CFR 541.500(c)

such as commission, salary, hourly, bonus payments, or piece rate but clearly the most common method of pay is commission.

1. For the purpose of this exemption, outside salesperson means any employee:
 - a. Whose primary duty is making sales or obtaining orders or contracts for services or the use of facilities for which a consideration will be paid by the client or customer; and
 - b. Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.²
2. When considering the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitation, including incidental deliveries and collections, are regarded as outside sales work. Also, other work such as writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences are considered exempt work since it furthers the employee's outside sales efforts.³
3. Within the meaning of the FLSA, "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition.⁴ Exempt outside sales work includes not only the selling of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order. The DOL does not, however, consider solicitors raising money for charitable organizations to be covered by the outside sales exemption because the concept of donating to a charity does not constitute "sales" for the purposes of this exemption.
4. An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee must make sales at the customer's place of business or, if selling door to door, at the customer's home.⁵ For this reason, salespeople who make their sales by telephone or by mail are not considered outside salespeople. Outside sales does not include sales made by mail, telephone or the Internet, unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether employee's home or office, used by a salesperson for solicitation of sales is

² 29 CFR 541.500(a)

³ 29 CFR 541.500(b)

⁴ 29 CFR 541.501

⁵ 29 CFR 541.502

considered one of the employer's places of business, even though the employer is not a tenant or owner of the property.

5. Promotion work may or may not be exempt outside sales work. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales and solicitation is exempt work. However, employees who have the job of contacting, developing and keeping business for the company are not exempt outside salespersons because their promotional work is incidental to sales made, or to be made, by someone else.⁶
 6. Delivery drivers may or may not be outside sales employees if their primary duty is making sales.⁷ Factors to be considered include:
 - a. whether the employee possesses a sales license, where required by law;
 - b. a comparison of the employee's duties to the duties of other employees who are either truck drivers or salespersons;
 - c. whether there is an agreement with the employee as to how much product must be delivered;
 - d. how the employee's job is described in the collective bargaining agreement, if applicable;
 - e. whether the employee receives sales training;
 - f. whether the employee attends sales conferences;
 - g. the method of paying the employee (e.g. hourly or commission); and
 - h. the proportion of the employee's earnings that come from sales.
 7. Many salespeople conduct the majority of their business on the telephone or over the Internet. Because they spend the majority of their time at their desks, they are nonexempt and must be paid overtime, unless the employer can show another exemption is applicable.
- B. The Retail or Service Establishment Exemption allows certain employees in retail establishments as discussed below to be exempt from overtime. However, employees are not exempt from minimum wage requirements and the employer must record hours worked.

⁶ 29 CFR 541.503

⁷ 29 CFR 541.504

1. The FLSA defines a “retail or service establishment” as an establishment that derives at least 75% of its annual dollar volume of sales from goods or services (or of both) that are not for resale and is recognized as retail in the particular industry.⁸ The typical retail transaction is one involving goods or services that are frequently acquired for family or personal use. A retail or service establishment within the meaning of the FLSA is one which is open and available to the general public, with which it has direct dealings in person, or by telephone, mail or Internet.⁹ An establishment that merely distributes goods to outside salespersons does not qualify as a retail or service establishment even though, on occasion, it may make some retail sales on the premises. Some examples of establishments recognized as retail include: automobile repair shops, book stores, funeral homes, hotels, clothing stores, sporting goods stores, and health clubs open to the public (not private membership clubs).¹⁰ Examples of establishments not recognized as retail include: banks and finance companies, accounting firms, law firms, travel agencies, medical and dental clinics and hospitals, real estate companies, roofing contractors, and HVAC contractors.¹¹

2. An employee of a retail or service establishment as defined above, need not be paid overtime if:
 - a. The employee's regular rate of pay exceeds one and one-half times the applicable minimum wage;¹²
and
 - b. More than half of the employee's total earnings in a representative period consists of commissions.¹³ See Example 5.
 - i. A representative period is at least one month.¹⁴
 - ii. The requirement will be met if the employee’s commissions exceed the total of all other compensation paid to the employee.
 - iii. The employee’s regular rate of pay will exceed the minimum wage requirement if the total compensation for the employee, including commissions and salary or wages (or any other kind of compensation) divided by the number of hours worked exceeds one and one-half times that of the federal minimum wage.

⁸ 29 CFR 779.312

⁹ 29 CFR 779.319

¹⁰ 29 CFR 779.318

¹¹ 29 CFR 779.317

¹² 29 CFR 778.24

¹³ 29 CFR 779.212

¹⁴ 29 CFR 779.417

EXAMPLE 5

Assume the employer is a retail store and the employees over a three-month period receive over 50% of their earnings in commissions. The employees work 50 hours a week. In week 1, an employee receives \$218.75 in commission.

The employer must assure that the employee's earnings exceed 1½ the applicable minimum wage. [Minimum Wage: \$5.15/hour as of September 1, 1997.]

Necessary minimum wages: (1½ x minimum wage) x hours worked
(1½ x \$5.15) x 50 hours = \$386.25

Therefore, the employer must pay the employee an additional \$167.50 (\$386.25 minus \$218.75)

In week 2, the employee receives \$1,313.13 in commission. Since that amount exceeds the necessary minimum wages, the employee need not be paid any additional monies.

C. The Automobile, Aircraft, Boat, and Farm Implement Dealers Exemption may apply regardless of the gross annual dollar volume of sales of the establishment or of the larger enterprise of which it may be a part. The establishment (1) may not be engaged in manufacturing and (2) must be primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate purchaser.¹⁵ The exemption does not require the business to be a retail or service establishment and the business can qualify even if it is selling primarily to industrial customers so long as they are the ultimate consumer.

1. The exemption from overtime applies to:
 - a. Salespersons, parts men, or mechanics primarily engaged in selling or servicing automobiles, trucks, or farm implements, if they are employed by a non manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers, or
 - b. Salespersons primarily engaged in selling trailers, boats, or aircraft, if they are employed by a non manufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.

¹⁵ 29 CFR 779.372

2. Parts men and mechanics who perform mostly nonexempt work - cleaning, changing tires, using tow trucks, picking up parts from other dealers do not qualify for the exemption because they are not "primarily engaged" in selling or servicing automobiles.
3. An automobile dealership is not "primarily engaged" in selling automobiles to ultimate purchasers where more than 50% of its annual dollar volume came from other activities - wholesaling of vehicles; sale of parts, accessories, gas and labor charges; etc. There is no exemption for motorcycle dealers.
4. "Service writers" (also called "service advisors" or "service salespeople") for automobile dealerships, whose job usually involves diagnosing problems with vehicles brought in for repair, writing up work orders for repairs, and assigning the work to mechanics, are generally considered to fall within the exemption for "selling or servicing automobiles." But these employers will qualify for exemption only if the majority (over 50%) of their work is for non-warranty servicing or repair.