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Calculating Overtime Pay

Dear Reader:

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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 CTAS website material.

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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.^[1] 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.

[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.^[1]

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.

[1] 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.^[1]

"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.

[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.^[1] 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.

[1] See 29 C.F.R. § 778.223.

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