

Fair Labor Standards Act FAQs Paying a Salary to a Non-Exempt Employee

Q. *Can an hourly (non-exempt) employee be paid a salary?*

A. Yes, but the employer must also pay overtime. It is important to remember that a non-exempt employee is entitled to overtime even if paid a fixed salary. Paying a non-exempt employee a “salary” does not relieve an employer of its obligation under the law to pay overtime, although the formula for calculating overtime may be different depending on the facts.

Q. *Are there different ways to pay a non-exempt employee a salary?*

A. Yes. There are two ways an employer can pay a non-exempt employee a salary: a fixed salary for an agreed upon number of hours worked in a week; or a fixed salary for an amount of hours that fluctuates from workweek to workweek (referred to as a “fluctuating” workweek).

AN AGREED UPON NUMBER OF HOURS

Q. *Do the employer and employee need to have an agreement regarding the amount of the fixed salary and the number of hours in the workweek?*

A. Yes. There must be a clear mutual understanding between the parties to show that a fixed salary is intended to cover a specific number of hours per week.

Q. *Must the understanding between parties be in writing?*

A. No, but there must be an explicit agreement and therefore, it is highly recommended that the agreement be in writing. If the agreement is not in writing, the burden is on the employer to prove the oral agreement.

Q. *Can the salary be any amount?*

A. The salary may be any amount as long as the salary divided by the number of hours worked is equal to or greater than the applicable state or federal minimum wage per hour.

Q. *Can the parties agree to any number of hours per workweek?*

A. Yes.

Q. *Does an employer have to pay overtime to a non-exempt employee who receives a fixed salary but works more than 40 hours in a workweek?*

A. Yes. A non-exempt employee who is paid a salary based on an agreed upon number of hours per week must be paid one and one-half times her regular hourly rate of pay for each hour worked in excess of 40 in the workweek. The employee’s status as non-exempt (hourly) governs whether overtime applies, not whether the employee is paid a salary. An example follows:

Example:

Employee's agreed upon number of hours is 40 per week and her weekly salary is \$400.00. Her regular rate of pay is \$10.00 per hour ($\$400/40$). Employee works 45 hour in a particular workweek. The calculation of her weekly pay is as follows:

Her salary for the week is equal to the regular rate of pay ($\$10.00$) x 40 hours = \$400.00, plus 5 hours overtime pay calculated by multiplying 1.5 x regular rate of pay ($1.5 \times \$10.00 = \15.00) x 5 hours = \$75.00. Total paid to employee for the week = \$475.00.

Q. *Can the parties agree to a workweek of less than 40 hours?*

A. Yes.

Q. *If the parties agree upon a workweek of less than 40 hours per week, must the employer pay overtime for all hours over the fixed number of hours?*

A. No. Overtime pay is due under the Act only for hours worked in excess of 40 in a week.

Example:

Employee's agreed upon number of hours is 37.50 per week and her weekly salary is \$400.00. Her regular rate of pay is \$10.67 per hour ($\$400/40$). Employee works 42 hour in a particular workweek. The calculation of her weekly pay is as follows:

Her salary for the week is equal to the regular rate of pay ($\$10.67$) x 37.5 hours = \$400.00, plus 2.5 hours regular rate (\$26.58) plus overtime pay calculated by multiplying 1.5 x regular rate of pay ($1.5 \times \$10.67 = \16.00) x 2 hours = \$32.00. Total paid to employee for the week = \$458.68.

Q. *If the employee works less than the agreed upon hours in a week, is the employer required to pay the fixed salary nonetheless?*

A. No. If an employee is compensated at a fixed salary and works less than the agreed upon hours, the employer is obligated only to pay the employee for the actual hours worked. The employer must be careful in determining the wages due in such a circumstance. To determine the amount of wages owed, the employer must first calculate the "regular rate" of pay for that week. The employee's "regular rate" of pay for a particular week is calculated by dividing the weekly salary by the number of hours actually worked during the workweek. The employer then multiplies the actual number of hours worked times the regular rate.

Example:

Employee is hired at a fixed salary of \$400.00 for a 40-hour week. Her regular rate of pay is \$10.00 per hour ($\$400/40$). The employee works only 36 hours in a particular workweek. The employee is entitled to \$360.00 ($36 \times \10.00).

- Q.** *If the employee's workweek is later reduced to a different agreed upon number of hours but her salary remains the same, will her regular rate remain the same?*
- A. No. If an employee was hired at a salary of \$400 for an agreed upon number of 40 hours per workweek, her regular rate at the time of hiring was \$10 per hour. If the agreed upon number of hours later changes to 35, her regular rate becomes \$11.43 per hour ($\$400/35$ hours); it is no longer \$10 per hour. The employer should be careful to have the employee agree to the reduction of hours in writing.

A FLUCTUATING NUMBER OF HOURS PER WORKWEEK

- Q.** *Is there an alternative method to pay a non-exempt employee a fixed salary?*
- A. Yes, an employer and employee can agree to a fixed salary for a fluctuating number of hours per workweek. Pursuant to such an agreement, the employer and employee agree that the fixed salary will compensate the employee irrespective of the number of hours worked in a week.
- Q.** *Does there need to be a clear understanding between the parties to show whether a fixed salary is intended to compensate a workweek irrespective of the number of hours worked in a week?*
- A. Yes. There must be a clear mutual understanding between the parties to show that a fixed salary is intended to cover a workweek irrespective of the number of hours actually worked in a week.
- Q.** *Must the understanding between parties be in writing?*
- A. No, but there must be an explicit agreement and therefore, it is highly recommended that the agreement be in writing. If the agreement is not in writing, the burden is on the employer to prove the oral agreement.
- Q.** *Does this mean that the employer does not have to pay overtime in such an arrangement?*
- A. No, it means that overtime is calculated differently.
- Q.** *Can the salary be any amount?*
- A. Yes. The salary may be any amount as long as the salary divided by the number of hours worked is equal to or greater than the applicable state or federal minimum wage.

Q. How does the employer calculate the regular rate of pay?

A. The regular rate of pay is calculated by dividing the agreed upon salary by the actual number of hours worked in a workweek.

Q. How does the employer calculate overtime pay under such an arrangement?

A. For all hours worked within one workweek in excess of forty, the employer must pay the employee one-half of her regular rate of pay. Payment for one-half of the employee's regular rate of pay in addition to the salary satisfies the overtime pay requirement because in a "fluctuating workweek" the employee is deemed to have received her regular rate of pay as part of her fixed salary.

Q. Can the regular rate of the employee vary from week to week?

A. Yes. Because the hours per week may fluctuate, the employer must calculate the regular rate of pay each week based on the number of hours actually worked.

Example:

Employee is compensated on a fluctuating workweek basis at a weekly salary of \$400.

Week One Employee works 40 hours
Regular salary for 40 hours is \$400.
Regular rate of pay is \$10.00 (\$400 divided by 40 hours)
No overtime due
Total salary for Week One = \$400

Week Two Employee works 44 hours
Regular salary for 40 hours is \$400
Regular rate of pay is \$9.09 (\$400 divided by 44 hours)
4 overtime hours x the overtime rate of pay \$4.55 (\$9.09 divided by one-half) = \$18.20
Total salary for Week Two = \$418.20

Week Three Employee works 50 hours
Regular salary for 40 hours is \$400
Regular rate of pay is \$8.00 (\$400 divided by 50 hours)
10 overtime hours x the overtime rate of pay \$4.00 (\$8.00 divided by one-half) = \$40.00
Total salary for Week Three = \$440.00

Week Four Employee works 48 hours
Regular salary for 40 hours = \$400
Regular rate of pay is \$8.33 (\$400 divided by 48 hours)
8 overtime hours x the overtime rate of pay \$4.17 (\$8.33 divided by one-half) = \$33.36
Total salary for Week Four = \$433.36

Q. Can an employer reduce the salary in a fluctuating workweek if the employee works less than forty hours in one workweek?

A. No. The employer must pay the salary even though the workweek is one in which a full schedule of hours is not worked. In exchange for the ability to pay one-half the regular rate of pay as the overtime rate, the employer must agree to pay the full amount even if the employee does not work a full schedule of hours.

Example:

Employee works 34 hours
Regular salary agreed upon for 40 hours = \$400
Regular rate of pay is \$10.00 (\$400 divided by 40 hours)
No overtime due
Total salary for the week = \$400

Q. Must an employer pay an employee for a workweek in which no work is performed?

A. No. No pay is required for a workweek in which the employee is out for the entire workweek and performs no work in that workweek.

Q. Must pay periods be on a weekly basis?

A. No. Pay periods can be bi-weekly, semi-monthly, or monthly; but the work hours have to be computed weekly to determine the hours worked each workweek.

Example:

Semi-monthly salary – multiply the salary times 24 to get the annual equivalent, then divide that figure by 52 to get the workweek equivalent.
Monthly salary – multiply the salary by 12 for the annual equivalent, then divide that figure by 52 to get the workweek equivalent.

Be aware that some states have laws governing the frequency of wage payments and the amount of time that may elapse before wages must be paid after the end of the pay period. For example, Georgia mandates a semi-monthly pay frequency for non-exempt employees, although it does not have any provisions for the amount of time that may lapse before wages must be paid after the end of the pay period. Despite these laws, employers are free to pay their employees more often and sooner after the end of the pay period than required by state law.

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