

Do Your Employees Know How to Tell Time?
An Overview of Wage-Hour Laws and Trap to Avoid

On August 12, 2010, NACS hosted a webinar for its members to review Wage-Hour Laws and how they affect the convenience store industry. The webinar consisted of a [PowerPoint presentation](#) by John Thompson, a wage-hour attorney at the law firm of Fisher & Phillips and a question and answer session (the full audio archive of the webinar is available [here](#)). Below, John Thompson has answered the remaining questions.

DISCLAIMER

Answers to the following questions are based upon the requirements of and principles under the federal Fair Labor Standards Act. Remember that states and other jurisdictions might impose different requirements that are subject to their own, particular interpretations.

These answers are provided for general informational purposes only. They are not and should not be construed to be legal advice or a legal opinion on any particular facts or circumstances, nor should they be taken as complete, technically precise, or all-inclusive explanations of the matters covered. A variety of statutory provisions, regulations, interpretations, and other authorities must be reviewed carefully and in detail when evaluating or applying the relevant principles. Furthermore, providing full and complete answers to questions like these typically necessitates a thorough development and analysis of a number of facts and circumstances in addition to those stated in general inquiries. You should develop an attorney/client relationship with and consult legal counsel competent in labor-standards matters concerning your own situation and any specific legal questions you might have.

Do we have to pay managers when they drop off deposits on the way home? If so, when does their time end? Do we correct anything in arrears or just change going forward?

We assume that these managers are not exempt from the FLSA's minimum-wage, overtime, and timekeeping requirements.

Making bank deposits on the way home is the sort of activity that typically does count as worktime. It should therefore be both recorded as worktime and compensated as the FLSA requires. Experience suggests that the worktime continues from the time the manager leaves his or her store for the bank until the manager has completed all activities relating to the deposit and leaves the bank for home.

How to go about changing any contrary past practice, and whether and how to approach compensating managers for past activities of this kind, involve a variety of important considerations beyond the scope of these brief answers.

Is there a rule of thumb on number of hours worked on the register that would disqualify a manager from the exempt status?

There is no such rule of thumb where working on the register is concerned. FLSA regulations defining that law's "white collar" exemptions (such as the executive exemption) suggest as a rule of thumb that an employee who spends more than 50% of his or her time in exempt work would "generally" be exempt. Usually, a manager performs a variety of both exempt and non-exempt work, so it is difficult to generalize about the impact of just one kind of activity, such as ringing sales.

What is the correct method to pay managers for travel time? Can normal commute time from their store location figure into this? What if something changes like their home store (transferred)?

We again assume that these managers are not exempt from the FLSA's minimum-wage, overtime, and timekeeping requirements.

The FLSA's rules about travel time depend upon the specific kind and circumstances of the travel involved. The time an employee spends in normal commuting between home and work generally is not compensable worktime. Experience suggests that an employee's travel between home and work would probably be normal commuting even if he or she is transferred to a different home store.

While training a district manager they are in the store learning all the ins and outs and practicing running a register, should these trainees be non-exempt employees? All of our district managers are exempt.

FLSA regulations defining that law's "white collar" exemptions (such as the executive exemption) say that an employee does not qualify as exempt until he or she is performing the duties of an exempt employee. That said, it is not possible to judge whether the trainees are or are not likely to be seen as qualifying for exempt status without more knowing a lot more about the training program. However, employers are wise to take a "go slow" approach in deciding whether to treat trainees for exempt jobs as being exempt during the training phase. Experience suggests that many industry trainees (such as Manager Trainees, for example) might well not qualify for exempt status.

If an hourly employee is scheduled to work from 11:00 until 4:00 and reports to work 15 minutes early as they are supposed to, but is not called to clock in until 11:45 but is required to wait in the store until called back, is the employer not required to pay them starting at 11:00 because they are engaged to be waiting even though they are not clocked in?

An employer must keep an accurate record of all hours worked by non-exempt employees, but whether waiting time is or is not FLSA worktime is not determined by whether the employee has or has not clocked-in. Although other circumstances might change the answer, it seems that the employer's requirement is that the employee report for duty and wait for something to do beginning at 10:45, such that the employee has been "engaged to wait" so as to cause the waiting time to be worktime under the FLSA.

Where can we find exemption standards for a "Management" position?

We assume that you are asking about the FLSA's executive exemption. Regulations setting out the requirements for that exemption are reproduced on the U.S. Wage and Hour Division's website at http://www.dol.gov/dol/allcfr/Title_29/Part_541/29CFR541.100.htm.

If we furnish an employee a uniform, can we charge for replacements even if they make minimum wage?

Under the FLSA, a non-exempt employee whose hourly rate is exactly the minimum wage cannot be charged anything for the replacement of a required uniform. A summary of the relevant principles can be found on the U.S. Wage and Hour Division's website at <http://www.dol.gov/whd/regs/compliance/whdfs16.htm>.

What if a salaried exempt manager asks off without pay? Are you still required to pay full salary?

Generally speaking, the FLSA's "white collar" exemption regulations permit deductions from the salary when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability. For example, if an employee who normally works five days a week takes off a whole day for personal reasons, the regulations would permit docking the salary by one-fifth, or 20%. However, given the importance of the "salary basis" in maintaining exempt status, an employer will want to be very careful to ensure that both the basis for and the amount of any such deduction are fully justified under the regulations.

Can a salaried employee's weekly pay be calculated by dividing his yearly salary by 365 and then multiplied by 7? I.e.- \$40,000 yearly salary, the weekly pay would be $\$40,000/365 = \$109.59 \times 7 = \$767.13$ weekly pay?

We assume that you are referring to the salary of an employee who is treated as exempt under the FLSA and who must be paid on a "salary basis". Because the "salary basis" is keyed to workweeks in which the employee performs any work rather than to workdays or calendar days, it is advisable to compute the weekly-equivalent salary by dividing the annualized salary of \$40,000 by 52 weeks, which comes to \$769.23.

What if a bonus is paid quarterly? How would you figure overtime wage? The bonus is based on cash shortage and inventory shortage.

We assume that it would be impossible or impracticable to attribute portions of the bonus to particular workweeks in which they were earned. If that is so, then the usual approach would be first to allocate the bonus equally to the 13 weeks of the quarter during which it was earned. Overtime would then be computed on the weekly-equivalent of the bonus for each workweek in which the employee worked more than 40 hours. Webinar Slide No. 18 gives an illustration of one way to make the overtime calculation for each such overtime workweek.

If employee is paid minimum wage, are you allowed to deduct payment for items they have charged at the store if they have given permission to deduct out of their payroll?

The answer can be affected by the specific circumstances. However, generally speaking, the FLSA will permit the employer to deduct the employer's cost of items the employee purchases for his or her own personal use and benefit. However, the employer may not make any deduction for profit on those items to the extent that this would reduce the employee's wages to below the minimum-wage or overtime due. Deducting the profit could also affect the exempt status of an employee who must be paid on a "salary basis" at a rate of at least \$455 per week if the person's pay was thereby reduced below this level.

I know bonuses have to be calculated with OT hrs in mind (per your earlier example), but what about commission based upon store sales? Is a % acceptable across the board or does OT affect these payouts also?

A commission calculated and paid as a percentage of store sales would be included in the FLSA's "regular rate" of pay, meaning that overtime premium pay would have to be computed on the bonus for a non-exempt employee.

The FLSA's Section 7(i) overtime exception applies to commission-paid employees of a retail or service establishment if certain requirements and conditions are met. However, qualifying for this exception necessitates more than simply paying a percentage of store sales as a commission in addition to regular wages. An employer should not rely upon this exception without careful analysis and advance planning.

Also, it is sometimes possible to avoid figuring additional overtime on a bonus if the bonus is computed as a percentage of a non-exempt employee's total straight-time *and overtime* wages for the bonus period. However, this too is an approach that requires careful planning and a properly structured bonus plan.

Can the purchase of uniforms be deducted from non-exempt wages?

The answer can be affected by the specific circumstances. However, generally speaking, under the FLSA an employer may neither deduct nor permit the employee to pay for the cost of a required uniform to the extent that this would have the effect of reducing the employee's wages to below the minimum-wage or overtime due. A summary of the relevant principles can be found on the U.S. Wage and Hour Division's website at <http://www.dol.gov/whd/regs/compliance/whdfs16.htm>.

Bonus calculation and overtime. John's example gave a weekly bonus, what about a monthly bonus. If a bonus is paid for the previous month, is the amount divided by the hours worked the previous month?

It is possible under some circumstances to compute the regular rate for such a bonus by dividing the bonus month's hours worked into the bonus. However, because calendar months almost always split workweeks, this approach can complicate the calculation of overtime on the bonus (for example, the bonus month typically includes hours worked that fall into an incomplete workweek at the month's end). Perhaps the more-standard method is to convert the bonus to a weekly-equivalent by multiplying the bonus times 12 and dividing the result by 52 (or multiplying the monthly bonus times $12 \div 52 = .2308$). Webinar Slide No. 18 gives an illustration of one way to make the overtime calculation for each overtime workweek ending in the month.

If an exempt employee cannot work a full week, but doesn't have vacation time available, can you adjust their pay by the missing time? Pay only 4 days in the week for example?

We assume that you are asking about whether you are permitted to pay only a portion of the salary of an employee who is treated as exempt under the FLSA and who must be paid on a "salary basis". It is not possible to answer this question under the "salary basis" principles without knowing more about the facts. For instance, what you may or must do depends in part upon why and for how much time the employee does not work during the workweek.

Bear in mind that those rules require an employer to pay the employee's full salary for every workweek in which he or she performs any work, unless the employer is permitted to deduct from the salary under one of the allowed exceptions. Those exceptions are listed on the U.S. Wage and Hour Division's website at http://www.dol.gov/dol/allcfr/Title_29/Part_541/29CFR541.602.htm.

We provide incentive to our non-exempt clerks for selling certain items, i.e. - 50 cents if they sell a \$10 pair of sunglasses. Does this amount need to be included in setting O.T. pay?

A incentive payment made because an employee sold certain items would be included in the FLSA's "regular rate" of pay, meaning that overtime premium pay would have to be computed on the bonus for a non-exempt employee. It is sometimes possible to ignore the overtime impact of such a payment under certain conditions if that impact falls below a specified level, but an employer should not do so without evaluating whether this is appropriate under the law and regulations or without taking the necessary supporting steps.

Would a call out fee for a driver for weekend work be the same as a bonus when calculating Regular Rate?

It is not possible to answer this question without knowing more about the circumstances and about the nature of this fee. Generally speaking, a lump-sum payment made to compensate the employee for the inconvenience of being called out to work on a weekend would be included in the FLSA "regular rate" of pay, meaning that overtime premium would have to be computed on the payment for a non-exempt employee.

Going on the response for the Health Insurance deduction from exempt employee does the same apply for Tax Levy and Child Support?

We assume that this question relates to garnishments issued for these reasons. Garnishments are typically regulated by the federal Consumer Credit Protection Act and similar state laws, which apply limitations that are different from those under the FLSA. A summary of the CCPA can be found on the U.S. Wage and Hour Division's website at <http://www.dol.gov/whd/regs/compliance/whdfs30.htm>.

After our employees are with us for 6 months they can get a company branded credit card (our own card) and make their store purchases on the card. The balance each pay period is then payroll deducted. They sign an authorization to allow us to take the deduction from their check. After the webinar I'm now wondering if this deduction has to be calculated so they are not paid under minimum wage? Or can it be considered like a medical insurance deduction because it's not for the cost of doing business; it's for their purchases of gas and goodies for themselves.

This question involves a number of potential issues and considerations that could affect the analysis depending upon particular facts and circumstances. As an illustration, it would be relevant if there are any deductions for card-related fees, administrative charges, interest, and so on. Generally speaking, the response to Question No. 11 applies here, including that deductions for card-related add-ons would be limited in the same way that deductions for profit are.

We provide uniforms for our employees at no expense to them. However, we do have a windbreaker that employees have the option to purchase as a direct-purchase item. Am I correct in that, if a non-exempt employee making minimum wage would like to purchase this windbreaker, under FLSA guidelines, they would be unable to purchase the windbreaker even if they wanted to do so by paying cash for the item?

If the employee's purchase of the windbreaker is truly and completely voluntary; is not required by his or her employer, by law, or by the nature of the work; and is at arms-length and made on the same basis as to a member of the public, then the FLSA would not prohibit a non-exempt employee's cash purchase of the garment.

John Thompson explained about paying employees bonus and calculating overtime. His example was a weekly bonus and I have a question about a monthly bonus. John used a \$100 bonus and the employee worked 55 hours. So he divided the \$100 by 55 and came up with 1.82 bonus regular rate. If we pay a bonus on the previous month, do we divide the \$ by the hours worked the previous month or just the current week we are paying the bonus?

See the response to Question No. 14. A bonus earned over a calendar month should not be handled for FLSA overtime purposes as if it was earned in the week in which it is paid.

How long do I need to keep time records (months, years, etc.)?

Recordkeeping rules under the FLSA require that basic employment and earnings records, like timesheets or time records showing daily starting and stopping times, be kept for two years. Other payroll records containing hours-worked information must be kept for three years. How long other kinds of time records must be kept would depend upon the exact nature of those records. Remember that state or local laws could impose their own requirements about how long time records must be kept.

Our employees purchase items (gasoline, cigarettes, candy, etc.) and put it on "in-house", each pay period their in-house charges are deducted from their paycheck. Is this legal even if it takes them under the minimum wage?

See the responses to Questions No. 11 and 19.