

## **Applying Advanced Wage and Hour Law: Computing the "Regular Rate" for Overtime**

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The basic provisions of wage and hour law require that employees who work more than 40 hours in a given work week must be paid at least one and one half times their regular rate of wage. While special overtime rules apply to government agencies, hospitals, canneries, manufacturing establishments and public works construction projects, some of the most frequently asked questions on overtime from employers have to do with how to compute the "regular rate."

### **Q: Most of my employees are not paid on an hourly basis, so how do I compute a regular rate of wage?**

A: Absent an express agreement between you and your employees which specifies the regular hourly rate, the "regular rate" is an hourly rate arrived at by dividing the total remuneration for employment in any work week by the total number of hours actually worked. ORS 653.261; OAR 839-020-0030(2)(b).

Salaried employees whose duties do not qualify them for the typical executive, administrative or professional exemptions must also be paid overtime for any hours worked over 40 in a workweek. To arrive at the regular rate of wage for these employees, you will need to reduce their salary to its hourly equivalent. For example, if an employee is paid a monthly salary for which he or she is expected to work a 40-hour week, the regular rate is determined by (1) multiplying the monthly salary by 12 to get the annual salary; (2) dividing the annual salary by 52 to get the weekly salary; and (3) dividing the weekly salary by 40 to get the regular hourly rate.

Under certain circumstances, a fixed salary may be paid for all hours worked, whether few or many. This type of arrangement (referred to as the "fluctuating workweek method") is permissible provided: (1) there is a clear mutual understanding that the employee will receive a fixed salary for the hours worked each week, whatever their number; (2) the amount of the salary provides compensation to the employee at no less than minimum wage; and (3) in addition to the fixed salary, the employee receives overtime compensation for all hours worked in excess of 40. Since the number of hours actually worked may fluctuate from week to week, the regular rate for the employee will also vary from week to week and is determined by dividing the number of hours worked in the work week into the amount of the salary to obtain the applicable regular hourly rate for that week. The employee would then be paid for any overtime hours worked at one half of this regular hourly rate (since all hours have already been compensated at the regular rate, under the terms of the salary arrangement).

**Q: What about other compensation like bonuses, call back pay or vacation? Do these affect the regular rate?**

A: It depends. Although wage and hour laws define the regular rate in reference to all remuneration for employment, both state and federal law provide certain exceptions. Under Oregon law, for example, the definition of “regular rate” excludes commissions, overrides, spiffs, bonuses, tips or similar benefits like discretionary bonuses, gifts, profit sharing, thrift and savings program, trusts, reimbursements for expenses, holiday, or vacation pay. Keep in mind, however, that commission earnings are included in the regular rate under federal law.

Under federal law, there are eight categories of payments which are not included in the regular rate: (1) gifts; (2) vacation, holiday or sick leave, or travel expenses; (3) discretionary bonuses; (4) fringe benefit plans, like retirement trusts; (5) premium overtime pay; (6) holiday or weekend overtime pay; (7) non-overtime premium pay agreed upon in a collective bargaining agreement; and (8) specific stock option compensation payments. 29 U.S.C. §207(e).

While some items, like holiday pay, may be safely excluded from the computation of the regular rate, the application of wage and hour law to other items like call back pay, show up pay, or payment for working a holiday can be complex. Before deciding whether to exclude a certain type of payment from your regular rate computations, consider seeking the advice of a qualified employment law attorney or contact BOLI’s Technical Assistance for Employers Program (TA). TA offers a variety of training seminars on wage and hour laws and other topics of interest to Oregon employers. **Our upcoming seminar schedule, resources and publications for employers, as well as our online fact sheets are all available on our website at [www.oregon.gov/BOLI/TA](http://www.oregon.gov/BOLI/TA). You can also reach us by phone at 971-673-0824.**