



Overtime

Non-exempt employees must be paid one-and-one-half (1.5) times their regular rate of pay for all time worked in excess of eight hours, up to and including twelve hours, in any one workday, all time worked in excess of forty hours in any one workweek, and for the first eight hours worked on the seventh consecutive workday in any one workweek.

Non-exempt employees must be paid two (2) times their regular rate of pay for all time worked in excess of 12 hours in any one workday, and for all time worked in excess of eight hours on the seventh consecutive workday in any one workweek. Hours paid, but not worked (i.e. vacation, sick leave, holiday), are not considered hours worked for the purposes of calculating overtime.

Q. What is the "regular rate of pay," and how is it determined?

Overtime is based on the regular rate of pay. The regular rate of pay includes a number of different kinds of remuneration, such as hourly earnings, some non-discretionary bonuses, piecework earnings, and commissions. In no case may the regular rate of pay be less than the applicable minimum wage.

Ordinarily, the hours to be used in computing the regular rate of pay may not exceed the legal maximum regular hours which, in most cases, is 8 hours per workday, 40 hours per workweek. This maximum may also be affected by the number of days one works in a workweek. It is important to determine what maximum is legal in each case. The alternate method of scheduling and computing overtime under most Industrial Welfare Commission Wage Orders, based on an alternative workweek schedule of four 10-hour days or three 12-hour days does not affect the regular rate of pay, which in this case also would be computed on the basis of 40 hours per workweek.

The following are examples of how to calculate the regular rate of pay:

1. If an employee is paid one rate of pay on an hourly basis, that amount is the regular rate of pay.
2. If an employee is paid by the piece or commission, either of the following methods may be used to determine the regular rate of pay for purposes of computing overtime:
 - The piece or commission rate is used as the regular rate. Employees are paid one and one-half this rate for production during the first four overtime hours in a workday, and double time for all hours worked beyond 12 in a workday; or
 - Divide total earnings for the workweek, including earnings during overtime hours, by the total hours worked during the workweek, including the overtime hours. For each overtime hour worked employees are entitled to an additional one-half the regular rate for hours requiring time and one-half and to the full rate for hours requiring double time.

A group rate for piece workers is an acceptable method for computing the regular rate of pay. In using this method, the total number of pieces produced by the group is divided by the number of people in the group, with each person being

paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked. The regular rate cannot be less than the minimum wage.

If an employee is paid two or more rates by the same employer during the workweek, the regular rate is the "weighted average" which is determined by dividing their total earnings for the workweek, including earnings during overtime hours, by the total hours worked during the workweek, including the overtime hours.

Q. If a non-exempt employee works unauthorized overtime is the employer obligated to pay for it?

Yes, California law requires that employers pay overtime, whether authorized or not. California's wage and hour laws require that the employee be compensated for any hours he or she is "suffered or permitted to work, whether or not required to do so." California case law holds that "suffer or permit" means work the employer knew or should have known about. Thus, an employee cannot deliberately prevent the employer from obtaining knowledge of the unauthorized overtime worked, and come back later to claim recovery. The employer must have the opportunity to obey the law. An employer can discipline an employee if he or she violates the employer's policy of working overtime without the required authorization.

Q. Is a bonus included in the regular rate of pay for purposes of calculating overtime?

Yes, if it is a *non-discretionary* bonus. The regular rate of pay used to calculate overtime will be determined based on the type of non-discretionary bonus paid to the employee. If a non-discretionary bonus is based upon production or proficiency, all hours worked are used to calculate regular rate of pay.

If the non-discretionary bonus is a *flat sum* bonus that is not explicitly linked to performance or production incentives, for example an attendance and/or longevity bonus, then only straight time (not overtime hours) are used to calculate the regular rate of pay. For more information, see detailed example below.

Discretionary bonuses paid as gifts at a holiday or other occasion, such as a reward for good service, and not measured by or dependent upon hours worked, production or efficiency, are not included for purposes of determining the regular rate of pay.

Q. Are any amounts excluded from the regular rate of pay?

Yes, certain types of payments are excluded from the regular rate of pay. Examples include: sums paid as gifts for special occasions, expense reimbursements, payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or premium rates for Saturday, Sunday, or holiday work, and discretionary bonuses.

* Premium rates can only be excluded from the regular rate of pay if the premium rate is at least one and one-half times the employees' same hourly rate they receive for non-overtime hours on other days.

Q. How is overtime calculated if an employee works at different rates of pay in the same workweek?

If an employee is paid two or more rates by the same employer during the workweek, the DLSE provides that the regular rate is the "weighted average," which is determined by dividing the employee's total earnings for the workweek, including earnings during overtime hours, by the total hours worked during the workweek, including the overtime hours. For more information, see detailed example below.

Note: In *Levanoff v. Matthew Dragas, et al.*, a California Court of Appeal ruled that when employees work at different rates of pay, the employer may use the "rate-in-effect" method, rather than the "weighted average" method to calculate the regular rate of pay. The "rate-in-effect" method provides that the regular rate of pay used to calculate overtime is the hourly rate that is in effect at the time the overtime hours began. However, use caution when using this method

because the overtime rate should err to the benefit of the employee, and the employer must provide employees advance notice of the method it will use. Call your CEA HR Advisor team for assistance in this area if you are not using the “weighted average” method described above.

Q. Can an employer require an employee to work overtime?

Yes, an employer may dictate the employee's work schedule and hours. Additionally, under most circumstances the employer may discipline an employee, up to and including termination, if the employee refuses to work scheduled overtime. An employer cannot discipline an employee for refusing to work on the 7th day in a workweek and is subject to a penalty for causing or inducing an employee to forego a day of rest. However, an employee fully apprised of the entitlement to rest who independently chooses not to take a day of rest may allow such an employee to work.

Q. Last week I worked Monday, Tuesday, Wednesday, Thursday and Saturday, eight hours each day. I was out ill all day Friday. For the workweek I was paid 48 hours at my regular hourly rate. Am I entitled to eight hours of overtime pay?

No, you are not entitled to any overtime pay. Overtime is calculated based on hours actually worked, and you worked only 40 hours during the workweek. Another example of where you get paid your regular wages but the time is not counted towards overtime is if you get paid for a holiday but do not work that day. In such a case, the time upon which the holiday pay is based does not count as hours worked for purposes of determining overtime because no work was performed.

Q. When must an employee be paid for the overtime hours worked?

Overtime wages must be paid no later than the payday for the next regular payroll period after which the overtime wages were earned. (Labor Code Section 204) Only the payment of overtime wages may be delayed to the payday of the next following payroll period as the straight time wages must still be paid within the time set forth in the applicable Labor Code section in the pay period in which they were earned; or, in the case of employees who are paid on a weekly, biweekly, or semimonthly basis, not more than seven calendar days following the close of the payroll period.

Q. Can a non-exempt employee waive his or her right to overtime compensation?

No. California law requires that an employee be paid all overtime compensation notwithstanding any agreement to work for a lesser wage. An agreement or "waiver" will not prevent an employee from recovering the difference between the wages paid the employee and the overtime compensation he or she is entitled to receive. (Labor Code Section 1194)

Calculating Overtime with Two Rates of Pay

The overtime rate must be based on the weighted average of the employee's regular rate of pay and travel/training/shift differential rate of pay. Example of paying overtime to an employee with two rates of pay:

An employee normally earns \$20 per hour working for their employer and \$15 per hour for travel time. In one week, the employee works 40 hours at the office and spends 10 hours traveling.

\$20/hour x 40 hours = \$800
\$15/hour x 10 hours = \$150
\$800 + \$150 = \$950 (total weekly compensation before adding in overtime premiums)
\$950 divided by 50 hours (total hours) = \$19.00 (regular rate of pay)
\$19.00 divided by 2 = \$9.50 (overtime premium for time-and-one-half)

Based on the above calculations, you would pay an employee entitled to daily overtime (worked and traveled in the same day) as follows:

- Time-and-one-half: If the employee travels while time-and-one-half is due (for example, the ninth hour of a day), he/she would receive \$24.50 per hour. This is the \$15.00 travel rate plus the \$9.50 overtime premium.
- If the employee performs his/her regular duties while time-and-one-half is due, he/she would receive \$29.50 per hour. This is the \$20 rate he/she normally earns, plus the \$9.50 overtime premium.

Calculating Overtime for a Flat Rate Bonus

An employee normally earns \$14 per hour working for their employer and receives a flat rate \$80 bonus for attendance. In one week, the employee works 30 straight time hours and 1.25 OT hours.

$\$14.00/\text{hour} \times 30 \text{ reg hours} = \420
$\$14.00/\text{hour} \times 1.25 \text{ OT hours at time and one-half} = \$26.25 \text{ overtime on hours worked}$
$\text{OT on bonus: } \$80.00 \text{ (flat sum bonus)} / 30 \text{ regular hours} = \$2.66; \$2.66 \times 1.5 = \$3.99 \times 1.25 \text{ OT hours} = \4.98
$\text{Total Compensation } \$420.00 + \$26.25 + \$4.98 + \$80.00 = \531.23