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More Questions About the Overtime Rule Answered

Part-time work, different classifications for different years of experience and tracking hours all are head-scratchers

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As the Dec. 1 effective date for the new [overtime rule](#) nears, employers face thorny compliance concerns. Here are some specific questions you may be facing:

- Does a part-time employee need to meet the salary threshold?
- Can employees with the same job title and job description with varying years of experience be classified differently?
- Do employers have to track hours for nonexempt and exempt employees?

The short answers for these questions are yes, yes and sometimes yes. But the full answers are more nuanced.

Part-Timers

"The new regulations do not allow for prorating the minimum required salary to reflect part-time status," noted Paul DeCamp, an attorney with Jackson Lewis in Reston, Va., and former administrator of the Department of Labor's (DOL's) Wage and Hour Division. To be exempt under the new overtime rule, the minimum salary is \$913 per week or \$47,476 per year.

[SHRM members-only toolkit: [Calculating Overtime Pay in the United States](#)]

"In other words, an employee treated as 0.5 FTE [full-time employee] does not have a reduced minimum salary to be exempt reflecting 0.5 x \$913 per week," DeCamp explained. "Instead, the minimum of \$913 per week applies regardless of how many hours the employee works."

He said that this DOL position was not new. For federal law purposes, it might not be too much of a problem because few part-time employees working a significantly reduced schedule will have workweeks with enough hours to trigger overtime. "As a result, it may be fine to pay part-time nonexempt employees a salary, as long as the employer accurately tracks the hours worked, pays any necessary premium overtime and ensures minimum-wage compliance," DeCamp said.

But several states have daily overtime requirements that may come into play for part-time employees, he noted. And many states have meal or rest period requirements, or both, that apply to nonexempt employees.

Same Job Duties, Different Experience

Employees with the same job duties may be classified differently if their pay differs based on their experience, according to Jennifer Yelen, an attorney with Posternak Blankstein & Lund in Boston. She said that the job description and the job title don't govern: It is the job duties in addition to salary level that determine whether an employee may be classified as exempt.

Many employers bifurcate roles that involve exempt duties but that have employees both above and below the new minimum salary level for the federal [executive, administrative and professional exemptions](#), DeCamp noted.

"Employers generally base these distinctions on pay level, not on years of service per se, though there is often a correlation between those figures," he said. "Because any differential in compensation details can seem unfair to employees and thus invite scrutiny and potentially a claim, such as for an equal employment violation, it is important that employers be consistent in how they draw any such lines and that there be a clear and well-thought-out business reason for any pay differences."

Classifying employees differently even though they have the same job title, same job description and (of most importance) same duties but have varying years of experience "could potentially cause the exempt-level employee to believe he or she is misclassified and/or cause the nonexempt employee to believe he or she is being treated with less respect than the exempt employee," said David Woolf, an attorney with Drinker Biddle & Reath in Philadelphia.

While job titles don't govern job classifications, they can be helpful in explaining to workers why some individuals are exempt and others are nonexempt. "One way to delineate between the groups is to create two titles—such as 'senior' or a numerical suffix to the exempt position—that demonstrate hierarchical seniority," said Jim Swartz, an attorney with Polsinelli in Atlanta.

However, while it is possible to classify employees with the same job duties differently if their experience varies, Jesse Panuccio, an attorney at Foley & Lardner in Miami, opined that "If employees have the same job title and job duties, they generally should have the same FLSA [Fair Labor Standards Act] classification."

But Alfred Robinson, an attorney with Ogletree Deakins in Washington, D.C., and former acting administrator of the Wage and Hour Division, said, "It is legal for employers to classify employees differently under the FLSA even though they may have the same job title with the same job description and even perform the same duties. This position has been confirmed in a U.S. Department of Labor Wage and Hour Division opinion letter." He recommended differentiating between the positions, such as by having nonexempt nurses as "registered nurse I" and exempt ones as "registered nurse II," to "minimize morale challenges and a possible need to explain legally the basis for different classifications."

Tracking Hours

If an employee's job status changes from exempt to nonexempt, it is important to start tracking the worker's hours, Panuccio noted.

"Any timekeeping plan is acceptable as long as it is complete and accurate," Yelen said.

In addition to tracking all nonexempt employees' hours, some exempt employees' time should be tracked, according to DeCamp. Specifically, the federal record-keeping obligation still applies to certain computer professionals and commissioned employees of a retail or service establishment.

Yelen observed that "An employer may choose to track hours for exempt employees in connection with the limited circumstances in which it can legally make deductions from an exempt employee's pay."

In general, though, Robinson noted, employers do not need to track the hours worked each day or each workweek for exempt employees.

However, Swartz said, "Employers sometimes choose to track exempt employees' working time to aid in benefits administration—PTO [paid time off] for example."

"It may be a good idea to do some informal tracking at certain levels where there is the potential that the employee could later claim he or she is misclassified," Woolf added.

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