

Summary of Selected FLSA Pay Alternatives For Non-Exempt Employees

Whatever changes the U.S. Labor Department makes in its federal Fair Labor Standards Act "white collar" exemption definitions, some employers will decide that they can no longer rely upon these exemptions or are unwilling to take the steps necessary to do so. Management must then decide how to pay the affected employees so as to comply with the FLSA's minimum-wage and overtime requirements.

There are many ways to go about doing this, and each employer must carefully evaluate which alternative best achieves its objectives. The plan (or plans) selected must of course take into account the particular financial, operational, and practical aspects of the employer's organization, as well as the work its employees do and the circumstances under which they do it.

Consequently, detailed initial discussions of these matters are typically premature. Instead, the best first step is to look over what some of the general options are. We *briefly* touch upon some of these possibilities below. It might also be possible to implement one or more of these in a way that is designed to reduce the financial impact of converting one or more employees to non-exempt status.

As you review these summaries, keep in mind two important points:

- ◇ No pay plan or pay practice will reliably comply with the FLSA's minimum-wage and overtime requirements in the absence of *accurate* timekeeping methods that produce *accurate* information about each non-exempt employee's hours worked each workday and each workweek; and
- ◇ Management must also consider the applicable wage-hour and wage-payment requirements and limitations of every jurisdiction in which it employs affected workers.

The FLSA also authorizes approaches for certain narrow settings or circumstances that are too specialized to be covered here. For example, certain exceptions are available to public agencies, to hospitals or certain other healthcare establishments, for modified piece-rate plans, and so on.

Your Fisher & Phillips attorney will be ready to discuss any or all of these matters with you further.

In each of the scenarios summarized here, "overtime" refers to hours worked over 40 in a single workweek. The phrase "minimum wage" refers to the current FLSA minimum of \$7.25 per hour (but another jurisdiction's applicable minimum rate might be higher).

There are far too many variations on these themes to cover each nuance that might present itself. Moreover, other factors, such as the payment of bonuses or other amounts, might affect what an employer may do or must do to ensure compliance under any of these alternatives. The details of how any such pay plan is established and administered will be highly important.

- ❑ ***Payment on an hourly basis:*** The employee is paid at an hourly rate (of at least the minimum wage) for all of his or her hours worked in a workweek. The employee's pay increases when he or she works more hours and decreases when the employee works fewer hours. Overtime pay is due at 1.5 times the employee's hourly rate.
- ❑ ***Paying a salary as straight-time compensation for hours worked up to 40 in a workweek:*** The employee is paid a fixed amount (equating to at least the minimum wage) for the hours he or she works *up to 40*. Overtime pay is due at 1.5 times the rate figured by dividing 40 into the employee's salary.
- ❑ ***Paying a salary as straight-time compensation for all hours worked in a workweek:*** The employee is paid a fixed amount for *whatever* number of hours he or she works in the workweek. If he or she works fewer than the expected hours in a workweek, the fixed amount is not reduced (subject to limited exceptions). Overtime pay is due at 0.5 times the rate figured by dividing the fixed amount by the hours the employee worked in the workweek. The employee's average hourly rate for a workweek can never be less than the minimum wage.
- ❑ ***Paying a salary as straight-time compensation for hours worked up to a particular number over 40 in a workweek:*** The employee is paid a fixed amount for *whatever* number of hours he or she works in the workweek up to an established threshold number over 40. If he or she works less than that threshold number of hours in a workweek, the fixed amount is not reduced (subject to limited exceptions). The employee's average hourly rate for a workweek can never be less than the minimum wage.

For an overtime workweek of between 40 hours and the threshold number of hours worked, overtime pay is due at 0.5 times the rate figured by dividing the fixed amount by the hours the employee worked in the workweek. For an overtime workweek of *more than* the threshold number of hours, overtime pay is due (i) for the hours worked between 40 and the threshold number at 0.5 times the rate figured by dividing the fixed amount by the threshold number of hours, plus (ii) for the hours worked beyond the threshold at 1.5 times that same rate.

- ❑ ***Paying on a day-rate basis:*** The employee is paid a fixed amount as straight-time compensation for *whatever* number of hours he or she works in a *workday*. If he or she works less than the expected hours in a workday, the fixed amount is not reduced (*possibly* subject to limited exceptions). Overtime pay is due at 0.5 times the rate figured by dividing the total of the fixed daily amounts for the workweek by the hours the employee worked in the workweek. The employee's average hourly rate for a workweek can never be less than the minimum wage.

- ❑ ***Paying on a job-rate basis or task-rate basis:*** The employee is paid a fixed amount as straight-time compensation based upon each job or task completed and for all hours worked in the workweek (regardless of the kind or number). Overtime pay is due at 0.5 times the rate figured by dividing the total of the fixed job-rate or task-rate amounts for the workweek by the hours the employee worked in the workweek. The employee's average hourly rate for a workweek can never be less than the minimum wage.

- ❑ ***Paying on a piece-rate basis:*** The employee is paid a fixed amount as straight-time compensation based upon each "piece" or unit completed and for all hours worked in the workweek (regardless of the kind or number). Overtime pay is due at 0.5 times the rate figured by dividing the total of the piece-rate amounts for the workweek by the hours the employee worked in the workweek. The employee's average hourly rate for a workweek can never be less than the minimum wage.

- ❑ ***Paying on a commission basis:*** The employee is paid commissions that are his or her straight-time compensation for all hours worked in the workweek (regardless of the kind or number). Overtime pay is due at 0.5 times the rate figured by dividing the total of the commissions for the workweek by the hours the employee worked in the workweek. The employee's average hourly rate for a workweek can never be less than the minimum wage.

Retail employers might also consider whether such a situation might present appropriate circumstances for relying upon the FLSA's Section 7(i) [exemption](#).

Numerous regulations, interpretations, rulings, and other authorities must be specifically evaluated in applying the provisions of the Fair Labor Standards Act. These materials are for general-information uses only. They are not and may not be construed to be legal advice or to be a legal opinion on any specific facts or circumstances, or to be a comprehensive or all-inclusive compilation of facts or questions that are potentially relevant to these FLSA principles or requirements. You are urged to consult legal counsel competent in labor-standards matters concerning both your own, particular situation and any specific legal questions you might have.