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# Employee pay: Keep it legal

**A**s the owner or director of a child-care facility, you're required to comply with the federal Fair Labor Standards Act, or FLSA. Here are some common misperceptions about paying employees—and the facts that dispute them.

**I own a small child care center, so I don't have to pay minimum wages and overtime.** *False.* Child care programs are subject to the FLSA, often called the minimum wage and overtime law. If you have two or more employees, regardless of sales volume, you must comply with the law.

**The FLSA does not apply to nonprofit child care centers.** *False.* The law applies to nonprofit as well as for-profit facilities. Whether a facility is operated by a private employer, church, hospital, or factory makes no difference.

**I pay overtime after 80 hours on the job each pay period, and that's OK.** *False.* Overtime must be figured according to a fixed seven-day period. Most child care center owners believe their workers should receive at least the minimum wage, \$5.15 an hour, and some form of compensation if they work more than 40 hours a week. Many employers, however, don't know how to comply with the law in calculating hours worked and overtime.

According to the U.S. Department of Labor's Wage and Hour Division, you must count all hours worked during the "work week" and pay at least

\$5.15 for each hour. For all time in excess of 40 hours in that week, you must pay overtime, calculated at time-and-a-half.

A "work week" is a fixed seven-day period—Monday through Sunday, or Wednesday through Tuesday, for example. You may decide what the work week is, but once determined it must remain the same.

You also decide when to pay, whether once a week, every two weeks, or twice a month. Regardless of the pay period, overtime payments must be based on the work week. You are not permitted to average hours and pay overtime after 80 hours in a two-week period or 88 hours in a semi-monthly (twice monthly) period, for example. Each work week stands alone.

**I pay the tuition expenses for state-mandated training for all my employees, so I don't owe them additional money for their time.** *False.* The hours an employee spends in state-mandated training must be counted as work time, even though the employer pays the cost of training.

Just because the employee attends a workshop away from the center does not mean that time spent there is not work time. The employee must be paid at least the minimum wage, and if workshop time results in an excess of 40 hours that week, the employee must receive overtime as well.

One option to avoid paying overtime is to give the employee time off in the week of the workshop to make up for the time spent in the workshop. You



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must be careful, however, in counting all hours and verifying that the employee has been paid minimum wage for the week.

Consider this example: Carla, a full-time caregiver who earns \$5.50 an hour, has been told to take off four hours Friday afternoon to attend a four-hour workshop on Saturday. She is expected to pay the \$35 workshop fee out of her own money. Her paycheck for the week is \$220 (\$5.50 times 40 hours).

Even though Carla gets time off, her pay violates the minimum wage provisions of the law. The \$35 fee decreases her wages for that week to \$185 (\$220 minus \$35), which averages out to \$4.63 an hour (\$185 divided by 40). The employee is due at least an additional 87 cents an hour (\$5.50 minus \$4.63) to meet minimum wage. In this example, the employee is due \$34.80 (87 cents times 40 hours).

**My employees often volunteer their time for events outside regular business hours, and they often stay late on their own time when parents are delayed in picking up their children. I don't have to pay them for this extra time.** *False.* If you allow an employee to work, you must pay for the time. Employees are working when they offer to lead field trips, stay late to wait for parents, care for children during parents' meetings or "Parents' Night Out," host an open house or holiday party, participate in a fundraiser, or take home posterboard to make a room decoration.

Employees are working when they watch napping children, even if they are also eating lunch and talking

softly to their coworkers. The time cannot be counted as a lunch break. Employees are also working when they attend staff meetings.

The hours you do not count are those the employee actually does not work: vacations, holidays, sick leave, and personal time.

**Because my employees are salaried, they are exempt from overtime regulations.** *False.* A salary alone exempts no one from overtime regulations.

Many caregivers perform their work professionally, and many prepare activities for language, math, science, art, and other centers. Some caregivers hold college degrees. More often than not, however, they are not exempt from overtime payment.

There are exceptions. If your director supervises two or more full-time employees and is totally in charge of the facility, or if you've hired a certified teacher for kindergarten classes, an exemption may apply. Check with the Department of Labor to be sure.

**It's OK to let my employees accrue compensatory time when they have to work longer hours.** *False.* Accruing compensatory time and averaging hours across the pay period is illegal.

You may protest, "My cousin works for the state, and she accrues comp time." Or, "My husband, who manages a large department in his company works long hours, and all he receives is his salary." But the law is firm. Only state and local governments are allowed to bank comp time.

In child care, employees often must fill in for each other when a staff member calls in sick. Sometimes a caregiver will ask to trade with another employee to take a personal day. Some plead for longer hours at the straight hourly rate so they can earn more money. In each case, the employee who works longer hours is due payment for overtime. The FLSA does not allow employees to waive their rights to overtime or minimum wage.

What can you do? One option is to rearrange an employee's work schedule in the work week. Assume that Bill normally works Monday through Friday from 6 a.m. to 2 p.m. If you want him to attend an eight-hour workshop on Saturday, for example, you may ask that he leave an hour earlier Monday through Thursday and take off four hours earlier on Friday.

Another option is to hire a part-time floater. This employee can fill in for a staff member who calls in sick or needs to go to the dentist, or can stay late when Johnny's mother still has not arrived to pick him up at 6 p.m.

### **I pay employees a lower wage rate for training hours, and it's OK to pay any overtime—whether regular work or training—at this lower rate.**

*False.* Computing overtime at the lower rate is not allowed.

What's the correct way to figure overtime payment? Assume that Bertha earns \$5.30 an hour. She works only 32 hours the first week of August but fills in for an ill employee during week two, thereby working 44 hours that week. She is due \$169.60 ( $\$5.30 \times 32$ ) for the first week, and \$243.80 ( $\$5.30 \times 44$ , plus  $\$2.65 \times 4$  overtime hours) for the second week.

It's OK to pay a different wage rate for different types of work—\$6 an hour for classroom time and \$5.15 for training and staff meetings, for example. In this arrangement, when an employee works longer hours, you may add all the earnings together and divide them by the total hours worked to find the hourly rate for that work week. Then you figure the pay as described in the paragraph above.

Assume that LaKeisha accumulates 44 hours one week, and six of those are spent in a Saturday workshop. Her hourly rate is \$6 when caring for children and \$5.15 for training. First, you multiply the regular rate times the hours in the classroom ( $\$6 \times 38$ ), which is \$228. Second, you multiply the lower rate times the hours in training ( $\$5.15 \times 6$ ), which is \$30.90. Add the earnings ( $\$228 \text{ plus } \$30.90$ ), and divide by the total hours worked ( $\$258.90 \text{ divided by } 44$ ), which averages out to \$5.88 an hour. Use this hourly rate to compute pay for the week. Thus, multiply \$5.88 times 44 hours, which is \$258.72 and add overtime ( $\$2.94 \times 4$ ), which is \$11.76. For the week, LaKeisha earns a total of \$270.48 ( $\$258.72 \text{ plus } \$11.76$ ).

In some cases, a salary may be advantageous to you and the employee. In paying a salary, you must be willing to guarantee the salary amount when the employee works less than 40 hours a week because of vacation, sickness, or holidays, and you must assure that you pay the minimum wage for all hours worked. If the salaried employee works overtime, you may determine the hourly rate by dividing the salary by hours worked rather than dividing by 40.

For example, Graciela's hours vary each week, and you pay her a salary of \$350 a week, regardless if she works less than 40 hours. Under this agreement, the hourly rate varies by the week. If she works 50 hours, the regular hourly rate is \$7 ( $\$350 \text{ divided by } 50$ ). She has worked an extra 10 hours and is due another \$3.50 for each extra hour, for a total of \$385 for the week ( $\$350 \text{ plus } \$35$ ). Similarly, if she works 60 hours, the regular hourly rate is \$5.80 ( $\$350 \text{ divided by } 60$ ). She has worked an extra 20 hours and is due another \$2.90 for each extra hour, for a total of \$408 ( $\$350 \text{ plus } \$58$ ) for the week.

This method of computing overtime for a salaried employee is called "fixed salary for fluctuating hours." The advantage to the employee is that the same amount is guaranteed, even in short weeks. The advantage to the employer is that the hourly overtime payment decreases the longer the employee works in a long week.

**I pay my employees a bonus at the end of the year to compensate them for all mandated training and volunteer time, which is all right under federal law.** *False.* Paying a bonus at year's end as compensation for training and volunteer time during the year cannot be done to avoid paying overtime.

Most types of pay must be added to the gross pay before the overtime is figured. You cannot pay a bonus without including it in the regular hourly rate. Nor can you prefigure overtime into a salary based on what you think the employee will normally work.

If you find these overtime formulas confusing, here's one that won't fail you. Add the gross pay for the week, and divide it by the total hours worked in the work week. The result is the regular hourly rate. Divide this rate by two to obtain the additional amount to be paid for overtime, and multiply this figure by the number of overtime hours in the work week. Add this amount of overtime to the regular pay, which is the regular rate times the total number of hours worked that week.

**Since my employees are salaried, I don't have to keep a record of their hours on the job.** *False.* You do need to keep records on salaried employees. The FLSA and other laws require that you keep the following records for each employee:

- identification information: employee's name, home address, Social Security number, occupation, sex, and, if younger than 19, birth date;
- hour and day when the work week begins;
- total hours worked each workday and each work week;
- total daily or weekly straight-time earning;
- regular hourly pay rate for any week longer than 40 hours;
- total overtime pay for the work week;
- deductions from or additions to wages;
- total wages paid each pay period; and
- date of payment and pay period covered.

Keeping and storing records can be time-consuming and bothersome. But when an employee questions a check, or when a federal investigator asks to examine your pay registers, it's a relief to have proof of what you've paid.

**Last summer I hired a 12-year-old. The parent begged me, and because the parent gave written authorization, it was OK to hire this child.**

*False.* No one younger than 14 is allowed to work for you, regardless of parental permission. Child labor provisions are part of the FLSA. As long as you keep records of birth dates for all employees younger than 19 and hire only those 16 and older, you probably won't have any problems. You may hire workers as young as 14 and 15, but special hours and occupation restrictions apply. Contact the labor department for more information.

You must pay teenage workers just as you pay adult workers. There are no special pay provisions for minors.

**I really don't have to worry about violating the law.** *False.* Violations can result in your having to pay back wages, deal with penalties, and respond to lawsuits filed by employees.

The labor department seeks voluntary compliance from employers. Probably the worst that can happen is that you will have to pay back wages accumulated over the past two years. If you have violated child labor provisions, you will be assessed penalties.

If you're investigated a second time and violations are found, you are subject to penalties for minimum wage, overtime, and child labor violations. Rarely does an employer continue to violate the law after being penalized. Should an employer willfully disregard the law, the labor department can seek a court injunction and sue for back wages, liquidated damages, court costs, and attorney fees.

Moreover, employees—former or current, individually or as a group—always have the right to sue an employer for FLSA violations regardless of whether the labor department determines the employer is in compliance.

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