Calculating Overtime May Fluctuate

Question: I run a landscaping company. This being Oregon, we're never quite sure how much work we'll be able to complete each week, and my employees have become accustomed to unpredictable and fluctuating work schedules. But to make up for it, I pay them the same salary all year round. These employees are nonexempt (meaning they must be paid overtime), and they do in fact work a lot of overtime during the non-rainy periods.

I know that when you calculate overtime for salaried, non-exempt employees, you're supposed to base it on the number of hours the salary is intended to compensate each week. But in my case, there is no set number of hours they work; it's always changing. So how do I calculate overtime?

Answer:

Let's start with calculating overtime for non-exempt, salaried employees whose hours do **not** fluctuate.

As you mentioned, overtime for salaried employees is usually calculated by dividing the annual salary by 52 to get the weekly rate, and then dividing that amount by the number of hours the salary is **intended** to compensate for the week. The key word is "intended," and the assumption is that the employer is able to set a predictable number of working hours for the employee every week.

Example: You pay Jack the bookkeeper $52,000.00 each year, and it's understood that you expect Jack to work 40 hours a week. But it is tax season, and Jack works 50 hours this workweek. Here is how Jack's overtime is calculated:

$52,000.00 divided by 52 weeks equals $1,000.00 per week.

$1,000.00 divided by 40 hours equals 25, so $25.00 is the "regular rate" for calculating overtime. Since the expected 40 hours never changes, $25.00 will always be Jack's regular rate.

$25.00 divided by 2 is $12.50, which becomes the "half" in the "time and a half."

Since Jack's $1,000.00 is only intended to compensate him for 40, not 50 hours, Jack must receive time and a half ($37.50) for each hour worked over 40 hours. Ten hours times $37.50 is $375.00, which means Jack will receive $1,375.00 in pay for that week.

But there are some situations, like yours, where there is no set number of hours worked each week and that is not the method used to calculate overtime. In those situations where the nature of the work causes employees' hours to vary, you are allowed to use what is called a “fluctuating workweek” basis for calculating overtime.

It is important to remember that the law requires that there be a clear mutual understanding between the employer and the employee in order to use the “fluctuating workweek” basis for calculating overtime. It is in the employer's interest to have a written consent agreement or a written policy statement signed by the employee acknowledging that the “fluctuating workweek” computation is being applied.

With this method, since there is no set number of hours the salary is “intended” to compensate, you simply divide the actual hours worked each week into the set salary. Depending upon the number of hours worked in a week, the overtime rate can fluctuate quite dramatically from week to week.

For example, let’s say you pay Jane, a non-exempt landscaper, a regular salary of $1,000.00 per week. It is understood that she will receive that salary every week, regardless of how many hours she works in the week.

Week one is sunny every day, and Jane works 50 hours. You are still going to pay her the $1,000.00, and overtime will be calculated by dividing 50 hours into $1,000.00, to get a regular rate of $20.00. You then multiply 10 (the number of overtime hours) by $10 (half the regular rate), and you will end up paying her $100.00 of overtime. Her compensation that week is $1,100.00

Week two is also sunny and Jane works 60 hours (20 hours of overtime). For that week, you will divide her normal $1,000.00 salary by 60 and come up with a regular rate of $16.66. Half of $16.66 is $8.33, so you multiply $8.33 by 20 to get $166.60 in overtime pay. Jane’s compensation for that workweek will be $1,166.60.

But we know this nice weather can’t last forever. (This is Oregon after all!) In the third week, it rains almost every day, and Jane can only put in 10 hours of work. She is obviously not owed overtime, but must still receive her $1,000.00 salary for that week, per your arrangement with her.

Remember, the “fluctuating workweek” method of overtime can only be used when the nature of the work prevents employees from working regular hours. It is not something that employers can establish just because they want to do it that way. And unless the employee knows and understands this method of overtime payment, it will probably not withstand a wage claim.

Finally, since the employee is nonexempt, the weekly salary must always be enough to effectively pay them at least the minimum wage ($7.50) for every hour they work that week.

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