

## NON-EXEMPT OVERTIME

February, 2001

### Statutory Definitions:

The Fair Labor Standards Act's general overtime provision requires that non-exempt employees who work time beyond 40 hours in one standard workweek be paid overtime compensation at a rate of time and one-half the regular hourly rate.<sup>1</sup> This applies to all non-exempt employees, both regular and non-regular. Furthermore, Contingent 1 (hourly) employees – both nonexempt and exempt -- are always treated as non-exempt, since they do not meet the "salary basis test" for exemption under the FLSA.

Further, Maryland's wage and hour laws define the workweek for employees of the State of Maryland as time during which the employee is on duty (either on- or off-site in a teleworking arrangement), as well as time on paid leave.<sup>2</sup>

### University Policy on the Payment of Non-Exempt Overtime:

The standard work schedule for non-exempt employees is 40 hours worked with an unpaid meal break of at least 30-minutes. Examples of typical university work schedules are: M-F, 8:00 a.m. to 4:30 p.m., and M-F 8:30 a.m. to 5:00 p.m.

In accordance with the FLSA and COMAR, the university's policy on the payment of premium overtime is as follows:

**Premium overtime (1.5x) MUST be paid when a non-exempt employee's total accumulated hours in a paid status exceed 40 hours during the university workweek.**

The university's standard workweek begins at 12:00 a.m. on Sunday and ends at midnight on Saturday.

Premium overtime is not paid when hours exceed eight in one workday.

<sup>1</sup> FLSA § 7(a)(1), 29 U.S.C. § 207 (a)(1)

<sup>2</sup> COMAR 17.04.11.02

## **Pre-Authorization Requirement**

Non-exempt employees must perform work only during their regular work schedule unless the overtime work is approved by their supervisor in advance, or in the case of a bona fide emergency.

However, overtime hours worked by a non-exempt employee without the supervisor's knowledge typically shall be paid at the premium rate if the supervisor knew the overtime was worked, **or** the supervisor should have known of the work, consistent with the FLSA principle of "suffer or permit."

## **Duty of Management**

Deans, directors, department heads, and supervisory personnel are ultimately responsible for compliance with the university's policy on non-exempt overtime for employees within their span of control. Work schedules should be established and communicated to non-exempt employees, in order to assure that departmental needs are met, and to the extent operations permit, to provide flexibility for the employee.

**It is incumbent upon management (including front-line supervisors) to direct the unit operations and/or employee workload in a manner that ensures that non-exempt employees do not perform unscheduled work that results in overtime liability.** In other words, it is the duty of unit management to exercise control and see that work is not performed that it does not want performed. Mere promulgation of a university policy prohibiting non-authorized overtime is not enough. The employer must make every effort to enforce the rule.<sup>3</sup>

## **Supervisory Responsibilities**

The term "supervisor" refers to "any employee responsible for the performance of other employees, irrespective of job title. The supervisor is responsible for his subordinates and for what they do."<sup>4</sup>

- Supervisors must assure that hours are correctly recorded on the employee's timesheet. By signing the timesheet, the supervisor attests to the accuracy of the hours recorded.

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<sup>3</sup> 29 C.F.R. §785.13

<sup>4</sup> Personnel Policies and Rules for Classified Employees, University of Maryland (1990), I-2,3.

- To avoid overtime liability, a supervisor may direct a “temporary schedule change” within the same workweek so that a non-exempt employee’s hours in a paid status within the workweek do not exceed 40.

For example: A non-exempt employee has a typical M-F, 8-4:30 schedule. The supervisor asks the employee to stay 2 hours late on Wednesday to finish a critical project. If the employee works the remainder of the standard work schedule through the end of the week, the employee will have worked 42 hours, and shall be entitled to premium overtime for 2 hours. To avoid the overtime liability, the supervisor may direct the employee to work two fewer hours on Thursday or Friday of the same week to reduce the hours in a paid status to 40. **This is the prerogative of management.**

- Supervisors must ensure that the employees for whom they sign timesheets understand and comply with the policy on non-exempt overtime. Employees who do not comply with the policy should be counseled, the discussion should be documented, and progressive discipline should be initiated with the assistance of the Personnel Services Employee Relations unit (301.405.5651). **THIS IS A CRITICAL PERFORMANCE ISSUE, and once it is brought to the attention of the employee, it should be appropriately documented.**

### **Compensatory Time**

The department or unit may offer non-exempt employees the option of electing compensatory time off (earned at the premium rate) in lieu of cash overtime for accumulated hours in a paid status that exceed 40 hours in the university workweek. Departments are not required to offer compensatory time in lieu of the cash overtime payment since the operational considerations of the unit may make it impractical.

- The maximum compensatory leave that may be “banked” by a non-exempt employee is 240 hours (480 hours for public safety employees). Upon separation from the university, the employee’s compensatory leave balance must be liquidated and paid in full since it was earned as premium overtime. Non-exempt employees may elect comp time if it is an option made available by their department; **non-exempt employees may not be required to take comp time in lieu of premium cash overtime.**

“Rounding off” of time is permissible when it is *de minimus*, (minimal or insignificant). Typically, the rounding of five minutes total -- either way at the beginning of the workday and/or at the end of the workday -- is permissible and meets the standard of *de minimus*.

## Q&A

**“How do I handle an employee who ignores the policy on overtime?”** Recognize that this is a performance issue and that it is incumbent upon you as the supervisor to address in a timely manner. Pay the overtime, and initiate a progressive discipline process (i.e., informal discussion with the employee, verbal counseling, written reprimand, etc., depending on the severity of the offense). This is an appropriate matter for inclusion in the non-exempt employee’s PRD in the factor titled “Attendance and Punctuality”.

**“Why should the university have to pay the overtime when the employee knowingly violated university policy?”** The principle of “Suffer and Permit” applies in this situation. This means that it is presumed that the employer either knew the employee was working overtime *or should have known* that the employee was working under most circumstances. The Department of Labor has taken the stand that the employer’s authorization to work can be explicit or implied (such as in the case where a non-exempt employee works extra time to finish an important, time-sensitive project that he or she knows is important to you). Pay the overtime and move the issue into the performance management arena and initiate appropriate action.

**“We don’t have a budget for overtime. We tell our employees that we will not pay overtime to keep them from working it without authorization. Would that fly in a wage & hour audit?”** Such a statement violates the FLSA, which requires that overtime worked must be paid at the premium rate, regardless of the availability of funding.

**“We have a conscientious employee who likes to finish up her tasks at the end of the day so that she can begin the next day with a clean desk. She doesn’t want to be paid; she just likes the peace of mind that an organized desk brings. Doesn’t that get us off the hook she takes this upon herself?”** The FLSA expressly prohibits a non-exempt employee from working “off the clock” or “donating time” to the employer, even when it is completely voluntary. A non-exempt employee may not waive the FLSA’s overtime provisions.

**“What about when a non-exempt employee comes in early to prepare for the start of the day?”** If the employee performs any work tasks (as opposed to getting a cup of coffee), he or she should be paid for the time. Again, without prior authorization, you have a performance issue with this employee if he or she refuses to comply with the policy.

**“We have a non-exempt employee who eats at his desk so he can ‘surf’ the web during lunch. One day he answers the phone during lunchtime, or greets a couple of visitors to the office during his 30-minute lunch break. Does this become a paid lunch break, which may make the employee eligible for premium overtime?”** Yes, under this scenario, the lunch break must be paid. If the employee works the full workweek, in addition to working through the lunch break, he will be entitled to 30 minutes of premium overtime. The alternative is to offset the paid lunch break with a temporary schedule change that reduces his time by 30 minutes – either that same day, or another day during the same standard workweek.