

April 12, 2005  
NMHC 05-05

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## **APARTMENT INDUSTRY WAGE AND HOUR OBLIGATIONS**

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By Elizabeth Feigin Befus, Jennifer Redmond and Adam  
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- On August 23, 2004, new regulations went into effect that could significantly affect when firms must pay their employees overtime.
- This Members Only guidance reviews those changes, discusses which employers are covered by the rules, and how covered employers must classify their employees in order to comply with the regulations.
- It also includes frequently asked apartment-specific questions on complying with the law.
- Suggested distribution includes:
  - General Counsels
  - Human Resources Officers

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*The American apartment industry...working together for quality, accessible, affordable housing.*

## ABOUT NMHC/NAA

The National Multi Housing Council (NMHC) and the National Apartment Association (NAA) represent the nation's leading firms participating in the multifamily rental housing industry.

Based in Washington, DC, **NMHC** represents the interests of the nation's largest and most prominent firms in the apartment industry. NMHC members are engaged in all aspects of developing and operating apartments, including ownership, construction, management, and financing. The Council was established in 1978 as a national association to advocate for rental housing and to provide a source of vital information for the leadership of the multifamily industry. Since then, NMHC has evolved into the industry's leading national voice. The association concentrates on public policies that are of strategic importance to participants in multifamily housing, including finance, tax, property management, environmental and building codes. NMHC benefits from a focused agenda and a membership that includes the principal officers of the most distinguished real estate organizations in the United States. For more information on joining NMHC, contact the Council at 202/974-2300 or [www.nmhc.org](http://www.nmhc.org).

**NAA**, based in Alexandria, VA, is a federation of 168 state and local affiliated associations representing more than 32,000 members responsible for more than 5 million apartment homes nationwide. It is the largest broad-based organization dedicated solely to rental housing. NAA members include apartment owners, management executives, developers, builders, investors, property managers, leasing consultants, maintenance personnel, suppliers and related business professionals throughout the United States and Canada. NAA strives to provide a wealth of information through advocacy, research, technology, education and strategic partnerships. For more information, call 703/518-6141, e-mail [information@naahq.org](mailto:information@naahq.org) or visit [www.naahq.org](http://www.naahq.org).

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*The information discussed in this guidance is general in nature and is not intended to be legal advice. It is intended to assist owners and managers in understanding this issue area, but it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.*

## INTRODUCTION

Like all businesses, apartment firms must comply with a wide range of federal and state employment laws that govern everything from who a firm can hire to how much employees must be paid. On August 23, 2004, new regulations went into effect that could significantly affect when firms must pay their employees overtime. The new rules are the first attempt to modernize certain provisions of the Fair Labor Standards Act (FLSA), which regulates minimum wage, overtime, child labor, and employment recordkeeping, in more than 50 years.

The revised regulations, which the U.S. Department of Labor (DOL) says are needed to “restore the overtime protections intended by the FLSA,” change the criteria for determining whether an employee is eligible for overtime pay. Critics of the rules contend that they could cause workers to lose their overtime eligibility, however the DOL estimates that only 100,000 workers will lose their eligibility, while 6.7 million lower-wage workers will benefit from them.

Officials with DOL recently reported that since the rules went into effect, more workers have gained overtime eligibility than lost it, causing those employers who reclassified the status of their employees to increase their payroll budgets. Many employers were also faced with costs related to audits performed in preparation for complying with the new rules.

While the rules have raised some firms’ payroll expenses by increasing the number of employees owed overtime pay, firms will likely benefit from the clearer definitions the rules provide, which should help reduce firms’ potential liability for failing to properly classify and compensate employees.

Apartment firms are advised to review their position descriptions and compensation levels carefully to ensure that employees are properly classified for purposes of the FLSA. Proactively consulting your legal counsel and professional human resources team regarding exempt and nonexempt status will help to avoid costly investigations and potential class action litigation in the future.

This Members Only guidance reviews the most frequently asked questions about the new FLSA overtime requirements. In addition to covering the unique FLSA compliance challenges of our industry, it also details additional requirements imposed on firms that operate in the state of California. This state-specific guidance is included because California has particularly strict laws, and a large number of apartment firms do business in the state.

Despite some Congressional challenges to the regulations, apartment firms are reminded that the rules have already gone into effect and must be complied with. Firms are encouraged to evaluate their compliance with the new FLSA provisions as well as parts of the law that were not revised since the attention surrounding the regulatory changes may lead to increased employee complaints to DOL. This, in turn, could drive more DOL investigations.

## EXEMPT OR NONEXEMPT

The FLSA covers all employer “enterprises” that have at least two workers and have gross annual sales or business volume of at least \$500,000. Even when an employer isn’t covered under the “enterprise” test, an employee is covered if he or she is involved in interstate commerce. Given those inclusive definitions of coverage, it is safe to say that the vast majority of apartment firms must comply with the regulations.

The FLSA requires that covered employees be paid at least the federal minimum wage of \$5.15 per hour and one and a half times their regular wage for hours worked over 40 in a single work week. However, Section 13(a)(1) of the FLSA exempts from the overtime pay provision workers who are classified as “bona fide executive, administrative, and professional” employees. Together, these classifications are known as the “white collar” exemptions. The regulations also exempt outside sales personnel, skilled computer staff, and certain “highly compensated” employees. Those exemptions are the subject of DOL’s new rules.

As stated above, Section 13(a)(1) of the FLSA exempts from its coverage employees who satisfy certain criteria regarding their job duties and who are paid a minimum weekly salary. DOL’s updated regulations clarify these requirements by creating three tests to determine whether an employee is eligible for overtime compensation: 1) the Salary test (compensation level), 2) the Salary Basis test (whether an employee is paid on a salary, rather than an hourly, basis), and 3) the Duties test (whether an employee’s job functions are deemed exempt). Firms are reminded that an employee’s job title does not determine his or her exempt status; his or her salary and duties do. Thus, simply adding the word “manager” to an employee’s title, for example, does not make him or her exempt from overtime unless his or her job duties truly reflect those of an “executive”, “administrative”, or “professional” employee.

Firms should note that the DOL has expressly stated that the regulations do not apply to traditionally nonexempt positions insofar as they are not intended to take away the eligibility of “blue collar” workers to earn overtime pay. Importantly, non-management employees engaged in maintenance and construction are specifically entitled to minimum wage and overtime pay regardless of their wage level. Carpenters, electricians, mechanics, plumbers, iron workers, and laborers are also nonexempt regardless of their wage level.

***Test One: Salary (Compensation Level)***

Generally, if an employee earns less than \$455 per week, or \$23,660 annually, he or she is eligible for overtime even if the worker meets one of the duties-based exemptions discussed below. Conversely, if an employee earns more than the \$455 per-week threshold, he or she can be exempt from the FLSA’s overtime requirement, but only if the employee also meets the Salary Basis test, discussed below, and performs exempt office or other non-manual duties. Highly compensated employees, defined as those who perform office or other non-manual labor and earn at least \$100,000 annually, are exempt so long as they are paid at least \$455 per week on a salary basis. Such highly compensated employees must “customarily and regularly” perform at least one of the exempt duties discussed below. (This is a relaxed duties test that hinges on whether the employee performs exempt duties greater than occasionally but less than constantly.)

***Test Two: Salary Basis***

Even if an employee earns \$455 per week or more, the employee must also be paid on a salary basis (rather than an hourly rate) and perform the duties of a bona fide exempt executive, administrative or professional worker in order to be exempt from overtime requirements. In other words, exempt employees generally must receive their full, pre-determined salary for any week in which they work, regardless of the number of days worked or how well they performed. Importantly, not all exempt employees are subject to the salary basis test. For example, outside sales personnel and professional computer employees paid at least \$27.63 per hour need not satisfy this test. Exempt salaried employees are paid for their overall service rather than for the number of hours worked. Exempt employees must earn the minimum wage of \$455 weekly exclusive of any allowances like housing and employer payments for health insurance. Although salaried ex-

empt employees must be paid a predetermined amount, employers may require them to record their hours and work a specific schedule.

### ***Test Three: Duties***

In addition to the wage and salary-related tests, an employer must also assess whether an employee is exempt from overtime eligibility based on the nature of his or her duties. In order to be deemed exempt, an employee must qualify as a DOL-defined executive, administrative, or professional employee based on an analysis of his or her job functions.

- 1) *Executive Exemption:* To qualify as an exempt executive, an employee's "primary duty" must involve managing some aspect of the employer's business. Importantly, however, an exempt employee does not need to spend all, or even half, of his or her time on exempt duties. For example, an executive employee's qualifying primary duty must simply be the most important one the employee has.

The new rules include numerous examples of duties that qualify as executive in nature, including the authority to hire, fire, advance or promote. Even if the employee does not make the final decision, he or she may qualify as exempt if he or she makes recommendations on such employment issues that carry "particular weight." "Particular weight" may be shown even if other employees have greater influence over such matters. That authority may be demonstrated where part of the employee's job is to make those recommendations or suggestions, and by the frequency with which they are sought or replied upon.

Other examples of qualifying responsibilities include control over other employees' wages or hours, directing other employees' work, budget planning, and responsibility for legal compliance. Importantly, an employee's ability to merely discipline or evaluate another employee's performance alone does not meet this standard.

- 2) *Administrative Exemption:* To qualify for the administrative exemption, an employee's primary duties must involve office work or other non-manual duties that directly relate to the employer's operations or "management policies." Importantly, to qualify for the administrative exemption, the employee must exercise independent judgment on important subjects. The test for determining whether an employee qualifies for this exemption is twofold. First, is the type of work performed related to the business's operations or management policies? Second, does the employee's primary duty involve exercising discretion regarding significant issues? Determining whether a primary duty involves exercising discretion over significant issues is subjective, but DOL provides some guidance. The regulations state that the following examples may qualify: 1) the employee has authority to make decisions with financial impact; 2) the employee may independently digress from established practices; 3) the employee may negotiate and commit the employer in important matters; 4) the employee is involved in business planning; 5) the employee handles significant matters on behalf of the employer; and 6) the employee represents the company in fielding complaints and resolving them.
- 3) *Professional Exemption:* To satisfy the learned professional exemption test, an employee's primary duty must be intellectual in nature, require "advanced knowledge," and involve the exercise of discretion and judgment. Advanced knowledge must cover a field of "science or learning" customarily acquired by specialized study. The regulations note that both instruction and work experience may suffice in some cases, however, the professional exemption generally includes jobs in which employees acquire skills

through education. Some examples cited by DOL are lawyers, doctors, scientists, teachers, engineers, and registered nurses. The regulations also exempt computer and creative professionals such as graphic artists, musicians, writers, and actors.

## FREQUENTLY ASKED QUESTIONS

### 1. Are property managers exempt or nonexempt?

Under the FLSA, a Property Manager who is paid at least \$455 a week, but less than \$100,000 a year is exempt if:

- 1) his or her primary duty is management;
- 2) he or she regularly directs the work of at least two other employees; **and**
- 3) he or she has the authority to hire and fire or make recommendations as to hiring, firing, promotion, and demotion.<sup>1</sup>

A Property Manager's primary duty is almost certainly management if he or she spends more than 50 percent of his or her time in management activities; if he or she spends less than 50 percent of her time, a number of factors must be considered.<sup>2</sup>

Any Property Manager who is paid an annual salary of \$100,000 or more is exempt so long as he or she is paid at least \$455 a week.<sup>3</sup>

#### *California*

Under California law, a Property Manager is exempt if he or she receives a monthly salary of at least double the state minimum wage (currently \$2,340 per month or \$28,090 per year)<sup>4</sup> and spends **more than 50 percent** of his or her time performing exempt duties, as follows:<sup>5</sup>

- 1) she or he manages a property;
- 2) she or he regularly and customarily directs two or more employees;
- 3) she or he has the authority to hire and fire employees or to make recommendations as to hiring, firing, promotion, and demotion, and such recommendations are given particular weight; and
- 4) she or he regularly exercises discretion and independent judgment.<sup>6</sup>

### 2. Are leasing consultants exempt or nonexempt?

Leasing consultants do not qualify as exempt "outside sales employees" because they are not primarily engaged in making sales or obtaining orders or contracts away from the employer's place or places of business.<sup>7</sup> Nor do leasing consultants qualify under the exemption for "inside" sales employees compensated principally by commissions.<sup>8</sup> This exception

<sup>1</sup> 29 CFR § 541.100.

<sup>2</sup> 29 CFR § 541.700.

<sup>3</sup> 29 CFR § 541.601.

<sup>4</sup> Industrial Welfare Commission Wage Order (1)(A)(1)(f).

<sup>5</sup> Industrial Welfare Commission Wage Order (1)(A)(1)(e); California Labor Code § 515(e).

<sup>6</sup> Industrial Welfare Commission Wage Order (1)(A)(1)(a)-(d).

<sup>7</sup> 29 CFR § 541.500.

<sup>8</sup> 29 CFR § 779.410.

applies only to salespersons at retail or service establishments.<sup>9</sup> Apartment complexes do not qualify as retail or service establishments.<sup>10</sup> Finally, the inside sales exemption applies only where more than half of the employee's compensation in each representative period represents commissions.<sup>11</sup>

#### *California*

California's "outside sales employees" exemption is even narrower than the federal exemption and does not apply to leasing consultants. Wage Order 5, the California Wage Order that applies to property management, does not contain an exemption for "inside" sales employees working on commission.<sup>12</sup>

### **3. If a maintenance tech is on call, do I have to pay him or her when he or she is not working?**

Under the FLSA, whether an employer must pay for "non-working" time when an employee is on call depends on whether the employee's standby time is controlled or uncontrolled.<sup>13</sup> For example, if a maintenance technician is required to remain at or so close to the workplace that he cannot use the standby time for his own purposes, he or she is considered to be on controlled standby.<sup>14</sup> In contrast, when an employer requires only that a maintenance tech leave contact information for his or her managers, he or she is on uncontrolled standby.<sup>15</sup> A requirement that a tech respond to pages within 20 minutes is probably uncontrolled standby time.<sup>16</sup> Similarly, *de minimus* time spent responding remotely to calls or pages is uncontrolled standby.<sup>17</sup>

#### *California*

California's Wage Orders define hours worked as time subject to the control of the employer, which is broader than the federal definition. California's broader definition sometimes results in California courts taking a more expansive view of "controlled" standby, but the rules are essentially the same.<sup>18</sup>

### **4. When a maintenance tech is called back to work, how much must I pay him or her?**

Call-back pay is different from on-call or standby pay. Call-back pay applies only when an employee has already worked his or her regularly scheduled hours and is called back for a second time to the workplace. There are three possible methods for paying call-backs:

- 1) Pay the employee for the actual hours worked at the applicable rate of pay (*recommended*);

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<sup>9</sup> 29 USC § 207(i); 29 CFR § 779.414.

<sup>10</sup> 29 CFR § 779.317

<sup>11</sup> 29 CFR § 779.410.

<sup>12</sup> *Industrial Welfare Commission Wage Order No. 5.*

<sup>13</sup> *Department of Labor Wage-Hour Opinion Letter No. 2040 (August 12, 1997); Armour & Co. v. Wantock, 323 U.S. 126, 134 (1944).*

<sup>14</sup> 29 CFR § 785.17.

<sup>15</sup> *Id.*

<sup>16</sup> *Department of Labor Wage-Hour Opinion Letter No. 1939 (May 28, 1998).*

<sup>17</sup> *Department of Labor Wage-Hour Opinion Letter No. 2040 (August 12, 1997).*

<sup>18</sup> *Morillion v. Royal Packing Co., 22 Cal 4th 575, 578 (2000).*



- 2) Guarantee the employee a minimum number of hours pay regardless of how little they actually work (e.g. employee comes back for one hour but is paid for a guaranteed two hours)<sup>19</sup> (*possible but complicated*); or
- 3) Pay the employee a lump sum for each call-back regardless of hours worked (*not recommended*).

Of the three methods, only the first is recommended. Under the second, guaranteed minimum method, only the compensation paid for hours actually worked may be credited against overtime compensation due (*i.e.*, if an employee works for only one hour, but receives the minimum two-hour payment, only one hour's pay is credited against FLSA overtime requirements and only one hour's pay is included in the regular rate calculation.)<sup>20</sup> The third, lump sum method, is lawful only when the payment meets or exceeds the overtime rate. And, the lump sum is included in the regular rate, but is **not** credited against overtime.<sup>21</sup>

#### *California*

Under California law, an employee who is called back to work a second time after the regularly scheduled work day must be paid a minimum of two hours at the employee's regular rate of pay no matter how short a period of time is actually spent working.<sup>22</sup> Where actual time spent on a call-back, when added to the hours already worked that day, is greater than eight hours, California's daily overtime requirement is triggered.

## **5. What about the second call-back on the same day?**

The federal regulations have no specific rules regarding a second call-back.

#### *California*

It is unclear whether California's two-hour minimum requirement applies to subsequent call-backs.

## **6. Do I have to include call-back time when calculating the regular rate of pay?**

As discussed in question three, actual hours worked on a call-back are included in the regular rate of pay. Any extra time paid for by the employer is not included in hours worked.<sup>23</sup>

## **7. Do I have to pay for travel time when an employee is called back to work?**

There is no clear answer to this question. The federal regulations state that there may be instances where travel from home to work is considered working time.<sup>24</sup> Unfortunately, the example given in the regulations—when an employee is required to travel a "substantial" distance to a client site—doesn't answer our question.<sup>25</sup> If travel time is treated as com-

<sup>19</sup> 29 CFR § 778.221.

<sup>20</sup> *Id.*

<sup>21</sup> 29 CFR §§ 778.221, 778.308-11.

<sup>22</sup> *Industrial Welfare Commission Wage Order (5)(B)*.

<sup>23</sup> 29 CFR § 778.221

<sup>24</sup> 29 CFR § 785.36.

<sup>25</sup> *Id.*; *Department of Labor Wage-Hour Opinion Letter No. 2040 (August 12, 1997)*.

pensable working time, it may be compensated at a lower rate than regular time (as long as that rate is above the minimum wage).<sup>26</sup> If an employer elects to pay for travel time, travel time must be included in the regular rate.<sup>27</sup>

#### *California*

It is possible that California's broader definition of hours worked would result in call back travel time being treated as compensable. However, there is no clear direction on this issue.

## **8. Can I credit housing value against the minimum wage?**

The reasonable cost of the housing may be credited against the minimum wage if it is "customarily furnished" as compensation to the employee.<sup>28</sup> "Furnished" means that the employee must receive the benefit of the housing and must voluntarily (without coercion) accept it as a benefit.<sup>29</sup> "Customarily furnished" means furnished regularly by the employer or furnished by other employers engaged in a similar trade in the same or similar communities.<sup>30</sup> Conversely, if the housing is furnished primarily for the benefit of the employer, it cannot be credited against minimum wage.

#### *California*

California employers may not credit the value of housing against the minimum wage without a voluntary written agreement with the employee.<sup>31</sup> California has fixed maximum amounts for housing that may be charged if a credit is taken against the minimum wage. The maximum credit (for a single employee apartment) is \$381.20 per month or two-thirds of the ordinary rental value of the unit, whichever is less.<sup>32</sup>

## **9. Can I credit housing value against the minimum salary requirements for an exempt property manager or other exempt employee?**

The minimum salary requirements for exemption are exclusive of board, lodging, or other facilities.<sup>33</sup>

## **10. How are overtime wages calculated?**

For each designated work week, the employer must pay 1.5 times the regular rate of pay for every hour worked in excess of 40.<sup>34</sup> The regular rate is the total compensation paid to the employee divided by the total number of hours worked.<sup>35</sup> In the example below, an employee is paid \$10/hour and works 44 hours.

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<sup>26</sup> *Department of Labor Wage-Hour Opinion Letter (January 22, 1999)*; See *Townsend v. Mercy Hosp. of Pittsburgh* 689 F.Supp. 503 (W.D. Pa. 1988).

<sup>27</sup> *It is possible that a reasonable agreement with the employee not to treat travel time as hours worked, but to pay compensation, would be respected and not calculated as part of the regular rate.* 29 CFR § 778.320(b).

<sup>28</sup> 29 U.S.C. § 201(3)(m) (F.L.S.A.); 29 CFR § 531.29.

<sup>29</sup> 29 CFR 531.30.

<sup>30</sup> 29 CFR 531.31.

<sup>31</sup> *Industrial Welfare Commission Wage Orders (10)(C)*; *California State Restaurant Assn. v. Whitlow*, 58 Cal. App. 3d 340 (1976) (interpreting Ca. Labor Code §§ 450-451 to preclude "in kind" purchases of food or lodging and to require employee consent and inclusion in wage calculations for minimum wage.)

<sup>32</sup> *Industrial Welfare Commission Wage Orders (10)(C)*.

<sup>33</sup> 29 CFR 541.100(a)(1); 29 CFR 541.601(b)(1).

<sup>34</sup> 29 USC § 207(a).

<sup>35</sup> 29 USC § 207(e).

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Regular Time (1X)	10			10	10	10	
Overtime (1.5X)							4

The regular rate of pay is \$10 (\$440 regular hourly wages/44 hours worked). For each hour worked over 40, the employee is entitled to \$15 (1.5 x \$10). Thus, for the 4 hours of overtime the employee is entitled an additional \$60 in overtime.

$$\begin{array}{r}
 40 \text{ (regular hours)} \\
 \times \$10 \text{ (regular rate)} \\
 \hline
 = \$400 \text{ (regular hourly wages)}
 \end{array}$$

$$\begin{array}{r}
 4 \text{ (overtime hours)} \\
 \times \$15 \text{ (overtime rate)} \\
 \hline
 = \$60 \text{ (overtime wages)}
 \end{array}$$

*TOTAL wages for work week = \$460*

The calculation of the overtime wages becomes more complicated when employees have two rates of pay or receive other forms of compensation such as on-call pay, incentive bonuses, commissions, prizes and contest awards, discounted housing, etc. that must be included in the regular rate calculation. For these more complicated calculations, please see the discussion in other sections of this article and consult experienced counsel.

#### *California Law*

California law requires that employers pay nonexempt employees one and one-half the regular rate of pay for all hours worked in excess of eight hours per day or 40 hours in each designated work week. Employers must pay double time for hours worked over 12 per day on the first six days worked in the work week, and for all hours worked over eight on the seventh consecutive work day of the work week.

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Regular Time (1X)	8			8	8	8	4
Overtime (1.5X)	2			2	2	2	
Double Time (2X)							

The regular rate of pay is \$10 (\$440 regular hourly wages/44 hours worked). For each hour worked over 8 in a day or 40 in the work week, the employee is entitled to \$15 (1.5 x \$10). Thus, for the 8 hours of overtime the employee is entitled an additional \$120 in overtime.

$$\begin{array}{r}
 36 \text{ (regular hours)} \\
 \times \$10 \text{ (regular rate)} \\
 \hline
 = \$360 \text{ (regular hourly wages)}
 \end{array}$$

$$\begin{array}{r}
 8 \text{ (overtime hours)} \\
 \times \$15 \text{ (overtime rate)} \\
 \hline
 = \$120 \text{ (overtime wages)}
 \end{array}$$

*TOTAL wages for work week = \$480*

Thus, you can see that for the exact same work schedule, a California employee is entitled to more overtime.

The California definition of “hours worked” is somewhat broader than the federal definition for the purposes of calculating overtime.<sup>36</sup> For example, California’s definition of “controlled standby” time is broader than the federal definition and may result in more “hours worked” by the employee.

As under the FLSA, the calculation of the regular rate and overtime becomes more complex when employees receive additional forms of compensation. For assistance with complex regular rate calculations, please see the discussion in other sections of this article and consult experienced counsel.

An employer who pays overtime in compliance with California law will always be in compliance with the FLSA.

## 11. Do I have to take housing value into account when determining the regular rate of pay?

Housing provided to an employee may be excluded from the regular rate only if:

- 1) The employer requires the employee to occupy the unit as a condition of employment;
- 2) The employer provides the unit at **no cost**; and
- 3) It is understood that the unit is not a part of the employee’s wages.<sup>37</sup>

If the housing is not free of charge, it is considered a part of wages, and the “reasonable cost” must be included in the regular rate.<sup>38</sup> In general, non-cash wages (including lodging) may be excluded from the regular rate if agreed upon under a valid collective bargaining agreement.<sup>39</sup>

### *California*

In California, wages include all amounts for labor including lodging.<sup>40</sup> California’s Wage Orders specify the amounts that may be charged for housing when its value is used to meet minimum wage obligations.<sup>41</sup> Regardless of the amount credited toward the minimum wage obligation, the DLSE takes the position that fair market value of the housing must be included in the regular rate.<sup>42</sup>

If an employer does not credit the value of housing against the minimum wage, it may, by written agreement, charge a resident manager rent of up to two-thirds of the fair market value of the housing.<sup>43</sup> The employer must include the difference between the rent charged and the fair market value of the housing in the regular rate of pay if the resident manager is

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<sup>36</sup> *Morillion v. Royal Packing Co.*, 22 Cal 4th 575, 578 (2000).

<sup>37</sup> *Department of Labor Wage-Hour Opinion Letter* (Sept. 1, 1999).

<sup>38</sup> 29 CFR § 778.116; 29 CFR §§ 531.3-531.5.

<sup>39</sup> 29 U.S.C. § 201 (3)(m) (F.L.S.A.); 29 CFR Part 531; 29 CFR § 778.116.

<sup>40</sup> *Ca Labor Code* § 200; *D.L.S.E. Enforcement Policies and Interpretations Manual* § 49.1.2.2; *Industrial Welfare Commission Wage Orders* (7)(A)(4).

<sup>41</sup> See answer to question supra.

<sup>42</sup> *D.L.S.E. Enforcement Policies and Interpretations Manual* § 45.4.7.2.

<sup>43</sup> *Ca Labor Code* § 1182.8.

nonexempt.<sup>44</sup> If the resident manager is exempt, then the minimum salary requirements must be met irrespective of the value of the housing provided.

## 12. What is the difference between a commission and a bonus?

In general, a commission must arise from the sale of a product or service, not the making of a product or rendering of a service.<sup>45</sup>

### *California*

Under California law, a commission is based on a percentage of the price of the product or service sold.<sup>46</sup> Bonuses, on the other hand, are not dependent on the price of a product or service, but rather upon the reaching of goal.<sup>47</sup> Thus, if an employer pays a set rate (let's say \$100) for each lease signed, that payment is a bonus under California law.

## 13. Are bonuses and commissions included when applying the salary test to determine whether an employee is above the salary threshold for exemption?

No. The definition of "salary basis" for determining whether an employee is exempt includes only amounts "not subject to reduction because of variations in the quality or quantity of the work performed."<sup>48</sup>

## 14. Do I have to include leasing commissions when calculating the regular rate of pay?

Commissions must be included in the regular rate.<sup>49</sup> When commissions are paid weekly, the total commission paid is added to other compensation and divided by the hours worked.<sup>50</sup> If commissions are deferred, the employer may proceed as though commissions were not being paid (calculating the regular rate excluding commission payments) until the amount of commission is ascertained. When the commission is determined, the payment should be included in the regular rate and the employee paid any additional overtime.<sup>51</sup> If it is impossible to determine for which week a deferred commission was earned, the employer must use an equitable method for determining the extra compensation.<sup>52</sup> Approved methods include:

- 1) allocation of an equal amount to each week in question; or
- 2) allocation of an equal amount to each hour worked.

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<sup>44</sup> D.L.S.E. Enforcement Policies and Interpretations Manual § 45.4.7.2.

<sup>45</sup> *Keyes Motors, Inc. v. DLSE* 197 Cal. App. 3d 557 (1988); D.L.S.E. Policies and Interpretations Manual § 34.1; 29 CFR 778.117 (noting that commissions are based either on total sales or on sales above a specific minimum).

<sup>46</sup> *Keyes*, 197 Cal. App. 3d 557; *Ramirez v. Yosemite Water Company, Inc.*, 20 Cal.4th 785 (1999); Ca. Labor Code § 204.1.

<sup>47</sup> D.L.S.E. Policies and Interpretations Manual § 34.1.3.

<sup>48</sup> 29 CFR § 541.602.

<sup>49</sup> 29 CFR § 778.117.

<sup>50</sup> 29 CFR § 778.118.

<sup>51</sup> 29 CFR § 778.119.

<sup>52</sup> 29 CFR § 778.120.

### *California*

California also classifies commissions as wages.<sup>53</sup> In addition to regular overtime pay based on the hourly wage, the employer must calculate a separate regular hourly commission rate to determine the overtime due on commissions. The commission rate is the total commissions earned for the week divided by the total number of hours worked (including overtime hours). The employee is entitled to half of that rate for each overtime hour worked.<sup>54</sup>

## **15. Do I have to include bonuses when calculating the regular rate of pay?**

Whether a bonus must be included in the regular rate is determined by the nature and purpose of the bonus. Bonuses paid in recognition of services are excluded from the regular rate if:

- 1) both the decision to pay and the amount paid are at the sole discretion of the employer; **or**
- 2) the payments are made pursuant to a bona fide profit-sharing plan.<sup>55</sup>

Bonuses paid as gifts for past services that are not dependent on hours worked, production, or efficiency are not included in the regular rate.<sup>56</sup> Christmas and special occasion bonuses fall into this category. Bonuses based on a percentage of total earnings (including overtime) are also excluded from the employee's regular rate of pay.<sup>57</sup> On the other hand, bonuses paid to increase employee efforts are included in the regular rate.<sup>58</sup> Examples are attendance bonuses, speed bonuses and production bonuses (which include leasing bonuses). When a bonus must be included, it should be apportioned over the work period during which it was earned.<sup>59</sup>

### *California*

California has the same rules for discretionary bonuses, profit sharing plans, and gift bonuses,<sup>60</sup> and for piece rate and production bonuses.<sup>61</sup>

## **16. Am I required to give employees a meal break or can they work through lunch and leave early?**

The FLSA does not require meal breaks.

### *California*

An employer must provide a meal period of at least thirty minutes for any employee who works over five hours. This break can be waived by mutual consent only if the employee works less than six hours.<sup>62</sup> If the work day is more than six hours and the employer fails to

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<sup>53</sup> Ca Labor Code § 200(a).

<sup>54</sup> D.L.S.E. Enforcement Policies and Interpretations Manual § 49.2.1.2.

<sup>55</sup> 29 CFR §§ 778.208-215; Department of Labor Wage-Hour Opinion Letter (April 27, 1999); For a discussion of what constitutes a bona fide profit sharing plan See Department of Labor Wage-Hour Opinion Letter (October 29, 1999).

<sup>56</sup> 29 CFR § 778.212.

<sup>57</sup> 29 CFR § 778.210; Department of Labor Wage-Hour Opinion Letter No. 2016 (January 23, 1997).

<sup>58</sup> Department of Labor Wage-Hour Opinion Letter No. 2016 (January 23, 1997); See e.g. Department of Labor Wage-Hour Opinion Letter (April 17, 1998).

<sup>59</sup> Department of Labor Wage-Hour Opinion Letter No. 2016 (January 23, 1997).

<sup>60</sup> D.L.S.E. Enforcement Policies and Interpretations Manual §§ 49.1.2.4 (1), (3) 49.1.2.1.

<sup>61</sup> D.L.S.E. Enforcement Policies and Interpretations Manual § 49.1.2.1.

<sup>62</sup> Ca. Labor Code § 512; Industrial Welfare Commission Wage Orders (11)(A).

provide a meal break, the employer must pay an additional one hour of pay at the regular rate for each day worked without a meal break.<sup>63</sup> It is unclear whether this extra hour of pay is considered a penalty or wages, subject to a longer statute of limitation and possible waiting time penalties at termination of employment.

Proposed new regulations indicate that an employer will be viewed as having “provided” a meal period as long as it:

- 1) makes the meal period available and allows the employee to take it;
- 2) posts the applicable order of the Industrial Welfare Commission; and
- 3) maintains accurate time records.<sup>64</sup>

In addition, an employee’s signed acknowledgement that he/she understands her rights to a meal period are evidence of compliance with the meal period requirement.<sup>65</sup>

There is a narrow exception which allows a limited waiver of the meal break by providing an “on-duty” meal break. An on-duty break is one during which the employee is not relieved of all duties. Three factors must be present for an employer to qualify for on-duty meal periods:

- 1) the nature of the work prevents the employee from being relieved of all duty;
- 2) the employee signs a written agreement consenting to an on-duty meal period; and
- 3) the written agreement contains a provision that the employee may, in writing, revoke it at any time.<sup>66</sup>

The test for whether the nature of work permits an on-duty meal period is objective: necessary job duties must prevent the employee from being relieved of all duty.<sup>67</sup> This type of exception generally only applies when the employee is working in an isolated location by her- or himself. If any relief is available, an on-duty meal break is not allowed.

## **17. Do I owe a bonus to an employee who terminates before the bonus payment date?**

The rights of employees under bonus forfeiture provisions are determined by common law contract principles. The concept most often used to challenge forfeiture provisions is unconscionability.

### *California*

*Resignation:* An employer may condition the payment of a bonus on continued employment through the bonus earning and calculation period so long as that condition is clearly stated in writing.<sup>68</sup> An employer probably cannot condition a bonus payment on continuing employ-

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<sup>63</sup> *Ca. Labor Code § 226.7; Industrial Welfare Commission Wage Orders (11)(B).*

<sup>64</sup> *Id. at (a)(1)*

<sup>65</sup> *Id. at (a)(2)*

<sup>66</sup> *Industrial Welfare Commission Wage Orders (11)(A); D.L.S.E. Enforcement Policies and Interpretations Manual § 45.2.3(2); D.L.S.E. Opinion Letter (November 3, 2003).*

<sup>67</sup> *D.L.S.E. Enforcement Policies and Interpretations Manual § 45.2.3(2)(a).*

<sup>68</sup> *D.L.S.E. Opinion Letter (January 19, 1993); Lucian v. All States Trucking Co., 116 Cal. App. 3d 972, 975 (1981) (an employee who leaves voluntarily before the calculation date is not entitled to the bonus.); D.L.S.E. Policies and Interpretations Manual §§ 35.2, 35.4.1.*

ment beyond the calculation date. For example, an employee who resigns before the bonus payment date but after the calculation date may have a claim for all or part of the bonus.

*Termination:* Because bonuses are viewed as unilateral contracts, an employer may not prevent an employee from performing under such a contract.<sup>69</sup> Therefore if an employee is terminated without cause close to the bonus payment date, she or he will likely have a claim for payment of the bonus.

Finally, California courts tend to take the entire context of the termination into account when determining whether a bonus is due.<sup>70</sup> For example, when an employee's salary is below the competitive rate, courts have determined that she or he is more likely to have worked in expectation of a bonus payment.<sup>71</sup> Under those circumstances, any time an employee is terminated before the payment of a bonus she or he might have a claim for at least a pro rata share of the bonus.

The answers in this section pertain largely to annual or semi-annual bonus plans. For production bonus plans please refer to the following section.

## **18. Do I owe commissions to an employee who terminates before the commission payment date?**

Commissions earned at the time of termination must be paid to the employee. However, **when** a commission is "earned" and **whether** commissions earned post-termination must be paid are entirely defined by the employment contract.<sup>72</sup> An at-will employee is not entitled to commissions earned post-termination in the absence of specific contractual provisions.<sup>73</sup>

### *California*

Employers may set conditions for the payment of commissions so long as the conditions are clear, unambiguous and lawful (*i.e.*, do not result in unlawful forfeiture of earned wages).<sup>74</sup> If an employee terminates before the lawful conditions are met, the commission need not be paid at the termination. However, if the conditions are met post termination, the commission must be paid to the employee. For example, if the prospective resident's payment of a rental deposit is the final condition for the leasing associate to earn a leasing commission and the deposit is paid after the employee is terminated, the commission must be paid. In the absence of express contractual provisions, courts sometimes award partial commissions for a reasonable period post termination for work performed before termination.<sup>75</sup> It is very important in California to put commission plans in writing.

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<sup>69</sup> D.L.S.E. *Policies and Interpretations Manual* § 35.4.

<sup>70</sup> D.L.S.E. *Opinion Letter* (June 3, 1987).

<sup>71</sup> *Division of Labor Law Enforcement v. Transpacific Trans. Co.*, 88 Cal. App. 3d 823 (1979).

<sup>72</sup> *Graff v. Enodis Corp.* 2003 WL 1702026, pp 2 (S.D.N.Y., 2003).

<sup>73</sup> *Swits v. New York Systems Exchange Inc.*, 722 N.Y.S. 2d 300, 302 (2001).

<sup>74</sup> *American Software, Inc. v. Ali*, 46 Cal. App. 4th 1386 (1996) (provision deferring payment of condition until payment actually received from the client); D.L.S.E. *Opinion Letters* (October 1, 1990, March 8, 1993); D.L.S.E. *Policies and Interpretations Manual* § 34.3.1.

<sup>75</sup> *Id.*



## 19. Why are some California employers being sued over the way they calculate bonuses?

Under the California Wage Orders, employers may not deduct from a nonexempt employee's wages "any cash shortage, breakage, or loss of equipment" not caused by a willful, dishonest, or grossly negligent act by the affected employee.<sup>76</sup> In recent class action lawsuits, courts have interpreted this to mean that if an employer deducts any of these items in calculating the bonus, the Wage Orders are violated and the employer must recalculate the bonus less the impermissible deductions.<sup>77</sup>

Companies have also been sued because their bonus plans include deductions for the cost of workers' compensation claims. Under California law, worker's compensation claims may not be charged to any employee, exempt or nonexempt.<sup>78</sup> Thus costs associated with such claims may not be included in any bonus or commission calculation.<sup>79</sup>

## 20. Can I require employees to pay for their uniforms and to keep them clean?

An employer may require employees to pay for uniforms and keep those uniforms clean unless the cost, when subtracted from the employee's wages, drops the regular rate of pay below minimum wage.<sup>80</sup> Rules requiring employees to wear certain outfits or types of outfits may be considered a uniform requirement.<sup>81</sup> On the other hand, employers may require certain types of "ordinary and basic street clothing" as long as it is not of a "specific or distinctive style, color, [or] quality."<sup>82</sup>

If the employer does not launder the uniforms, it should provide a maintenance allowance of one extra hour of compensation (at minimum wage) per week for the washing of a uniform.<sup>83</sup> Employers may change this rate via a collective bargaining agreement. There is an exception for "wash and wear" uniforms which can be laundered with personal clothing. A uniform is "wash and wear" if it requires only washing and tumble or drip drying; anything requiring ironing or dry cleaning is not "wash and wear."<sup>84</sup>

### *California*

An employer that requires nonexempt employees to wear uniforms must provide and maintain the uniforms, regardless of compensation. The term "uniform" includes wearing apparel or accessories of a distinct design or color.<sup>85</sup> The employer may either maintain the uni-

<sup>76</sup> *Industrial Welfare Commission Wage Orders (8)*.

<sup>77</sup> *Ralph's Grocery Company v. Superior Court*, 112 Cal. App. 4th 1090, 1101 (2003); *Quillian v. Lion Oil*, 96 Cal. App. 3d 156 (1979); *D.L.S.E. Policies and Interpretations Manual* § 35.6.

<sup>78</sup> *Ca Labor Code* § 3751.

<sup>79</sup> *Ralph's*, 112 Cal. App. 4th at 1102.

<sup>80</sup> *Hodgson v. Newport Motel Inc.* 87 Labor Cas. ¶ 33830; Department of Labor Wage-Hour Opinion Letters Nos. 1323 (June 7, 1974), 1326 (June 7, 1974), 1371 (April 17, 1975).

<sup>81</sup> *Marshall v. Root's Restaurant Inc.* 667 F.2d 559 (6th Cir. 1982) (*Rules limiting employees to outfits generally sold as uniforms by uniform stores held a uniform requirement*).

<sup>82</sup> *Department of Labor Wage-Hour Opinion Letter No. 1519 (July 28, 1978)*; *Marshall* 667 F.2d 559.

<sup>83</sup> *Department of Labor Wage-Hour Opinion Letter No. 1371 (April 17, 1975)* (*Setting a requirement of \$2.00 a week at a time when the minimum wage was \$2.00.*).

<sup>84</sup> *Department of Labor Wage-Hour Opinion Letter No. 1564 (July 31, 1981)*.

<sup>85</sup> *Industrial Welfare Commission Wage Orders (9)(A)*; *Department of Industrial Relations v. UI Video Stores, Inc.*, 55 Cal. App. 4th 1084, 1091-92 (1997).

forms itself, or provide a maintenance allowance that “shall be based on a realistic estimate of the time required ... [and] paid at the minimum wage.” An hour per week at minimum wage is generally considered a reasonable amount, but actual dry cleaning and pressing costs should be paid by the employer.<sup>86</sup> The employer may require a reasonable deposit for the uniform.<sup>87</sup> California follows the federal rules on “wash and wear” clothing.

## **21. Can I agree to a flexible schedule with an employee without incurring overtime?**

The FLSA does not have daily overtime requirements. As long as an employee does not exceed forty hours in a week, overtime pay is not required. Only Alaska, California, Colorado, Nevada, and Wyoming have daily overtime requirements.

### *California*

Because California requires overtime compensation for time worked in excess of eight hours per day, employees on flexible schedules longer than eight hours will have to be paid overtime unless an alternative workweek schedule is adopted. Upon an employer’s proposal, employees may vote to adopt an alternative workweek schedule that does not exceed ten hours a day and forty hours a week.<sup>88</sup> The proposal must be presented for a vote by secret ballot and approved by two-thirds of the affected employees. Because rigorous and complicated election procedures must be followed, please consult experienced counsel before implementing such a schedule.<sup>89</sup>

## **22. How should I treat a resident who assists with daily management in return for free or reduced rent?**

In most circumstances, a resident manager is not an independent contractor, but is instead an employee subject to the FLSA.<sup>90</sup> One of the key factors in distinguishing independent contractors from employees is the right to control the manner and means of the performance of the work. Thus, to the extent that a property management company directs the work of the resident manager or even reserves the right to do so, then the resident manager would be considered an employee. Additional factors weighing against independent contractor status include the extended duration of the engagement of the resident manager (i.e. not engaged for a limited term project), the lack of investment by the resident manager in facilities and equipment, the property management company’s right to assign more work to the resident manager, etc.

As an employee, a resident manager is entitled to receive minimum wage for all hours worked. However, the value of the housing provided to a nonexempt resident manager can be used to offset the required minimum wage payments. It is quite important to track time worked for resident managers in order to comply with minimum wage and other obligations.

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<sup>86</sup> D.L.S.E. Memorandum *Uniforms- An Explanation of Industrial Welfare Commission Regulations 5 (a)-(c)*.

<sup>87</sup> *Industrial Welfare Commission Wage Orders (9)(C)*.

<sup>88</sup> *Ca Labor Code § 511; Industrial Welfare Commission Wage Orders (3)(B)*.

<sup>89</sup> *Ca Labor Code § 511; Industrial Welfare Commission Wage Orders (3)(B)(6), (3)(C)*.

<sup>90</sup> See e.g., *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Hageman v. Park West Gardens*, 480 N. W. 2d 223 (N.D., 1992) (maintenance worker not an independent contractor for FLSA purposes.); cf *Judah v. Reiner*, 744 A. 2d 1037, 1041 -1042 (D.C., 2000) (residents occasionally hired to do repair work and paid per job were independent contractors).

Please also see the section of this article discussing crediting housing against minimum wage under the FLSA.

#### *California Law*

Resident managers are also employees under California law.<sup>91</sup> In California, the maximum credit against the minimum wage (for a single employee apartment) is \$381.20 per month or two-thirds of the ordinary rental value of the unit, whichever is less.<sup>92</sup> Thus, if the resident manager is working more than 56 hours a month (using \$381.20/\$6.75), you are required to pay additional wages. Property managers should require resident managers to track the hours that they work in order to ensure that they are meeting their minimum wage obligations.

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<sup>91</sup> *D.L.S.E. Enforcement Policies and Interpretations Manual § 28*; See also *Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989). *California courts, like the federal courts, use a multi-factor test to determine the “economic realities” of the situation. Resident managers fail the important “right to control” test and numerous other factors weigh against independent contractors status, including the failure to operate a distinct business, no personal investment in equipment or materials, lack of skilled occupation, no opportunity for profit or loss, and the extended duration of the engagement.*

<sup>92</sup> *Industrial Welfare Commission Wage Orders (10)(C)*.