

DON'T LET SHIFT DIFFERENTIALS LEAD TO COSTLY LITIGATION

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Shift differentials are common in the healthcare industry. But some employers may not realize that the differential must be calculated into the “regular rate” of pay, which is not exactly the same thing as the hourly rate.

While the vast majority of employers pay employees overtime at one and a half times their hourly rate, they may make the mistake of treating shift differentials as a separate compensation item. Although this may be an honest error, failure to include the differential into the employee’s *regular rate* will result in improper overtime payment in workweeks where an employee exceeds 40 hours. Specifically, failure to include differentials in the regular rate violates the Fair Labor Standards Act (FLSA) and can result in penalties to the employer from the Labor Department (DOL) as well as costly litigation.

The [DOL website](#) provides the following example for calculating single shift differentials:

A personal care assistant at an assisted living facility is paid \$8 an hour and overtime on the basis of the 40 hour workweek system. She works three eight-hour day shifts at \$8 an hour and three eight-hour evening shifts. The assistant is paid \$1 shift differential for each hour

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worked on the evening shift. How much should she be paid for her eight hours of overtime?

The additional half-time must be computed based on the regular rate of pay. The regular rate is defined as the total remuneration divided by the total hours worked. The assistant earned a total of \$408 for the 48 hours that she worked (\$8 an hour times 24 hours plus \$9 an hour times 24 hours). Her regular rate equaled \$8.50 and her half-time premium is \$4.25. Her total earnings for the 8 hours of overtime are \$102.

Some employees may receive more than one shift differential. All of them need to be factored into the regular rate of pay before performing the overtime calculations. The DOL website provides additional guidance for two different differentials.

Registered nurses (RNs) at a skilled nursing facility are paid a basic hourly rate of \$22 an hour. When they work the evening shift, they are paid a shift differential of \$1 an hour. When they work the night shift they are paid a shift differential of \$2 an hour. When working overtime, RNs are paid time-and-one-half of their basic

hourly rate of \$22. Is this in compliance with the FLSA overtime standard?

No. Under the FLSA, the additional half-time compensation must be paid on the regular rate which is defined as the total remuneration divided by the total hours worked. Overtime compensation must be calculated on the regular rate, which will exceed the hourly rate when shift differentials are paid.

Using the [DOL's analysis](#), if the RN worked 48 hours in a week using the two differentials, the weekly compensation calculation is as follows:

16 day hours x \$22 =	\$352
16 evening hours x \$ 22 =	\$352
16 evening hours x \$1 shift differential =	\$16
16 night hours x \$22 =	\$352
16 night hours x \$2 shift differential =	\$32
\$352 + \$352 + \$16 + \$352 + \$32 =	\$1,104 (total straight compensation)
16 day hours + 16 evening hours + 16 night hours =	48 total hours worked
\$1,104 (total straight time compensation) ÷ 48 (hours worked) =	\$23 (regular rate)
\$23 ÷ ½	\$11.50 (half-time pay)
\$23 + \$11.50 =	\$34.50 (overtime rate)
\$23 × 40 hours =	\$920 (straight time earnings)
\$34.50 (overtime rate) x 8 overtime hours =	\$276 (overtime earnings)
TOTAL WEEKLY EARNINGS	\$1,196

If the employer in this scenario failed to include the shift differential in the regular rate prior to calculating overtime, the nurse likely would have been underpaid by \$12 for that

week. Multiply this error by several weeks per year, double it for liquidated damages, add in other affected employees, topped off with the employees' attorneys' fees and costs, and a company can quickly find itself in a litigation hotbed. The statute of limitations in FLSA cases can be up to three years for willful violations. Not surprisingly, this kind of litigation has become increasingly attractive to plaintiffs' lawyers.

Taking steps now to ensure that your employees are paid correctly can help you avoid these costs and risks. Properly calculating and correcting shift-differential calculations is a simple compliance matter that can save considerable time, stress, and expense down the road. If you would like some help developing a plan to properly compensate impacted employees and limit litigation exposure, give us a call.

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