



# Establishing "Workweeks" For Exempt Employees

Insights

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We have written previously about how important the "workweek" concept is in complying with the federal Fair Labor Standards Act's minimum-wage and overtime requirements.

An FLSA workweek is a fixed, regularly-recurring period of seven, consecutive, 24-hour periods that management expressly adopts for FLSA purposes. Employers must select *and document* at least one such workweek (or a "work period" in limited situations) for their non-exempt workers. 29 C.F.R. § 516.2(a)(5).

## What About Exempt Employees?

It is important to remember that this same obligation also applies with respect to many employees who are *exempt* from the FLSA's minimum-wage and/or overtime provisions.

As a noteworthy example, U.S. Department of Labor recordkeeping regulations incorporate the workweek-selection/documentation requirement even for employees who satisfy all of the criteria for the executive, administrative, professional, or outside-sales exemption or a derivative exemption under the FLSA's Section 13(a)(1) (typically referred to as the "white collar" exemptions). 29 C.F.R. § 516.3. Choosing *and documenting* a workweek is as important with respect to these employees as it is for non-exempt ones, albeit for different reasons.

For instance, consider the "salary basis" of pay that is necessary to support exempt status for most such employees. The general requirement (with some exceptions) is that the full salary must be paid for every workweek in which the employee performs any work, without regard to the number of days or hours worked in that workweek. On the other hand, the employee need not be paid the salary for any workweek in which he or she performs no work. 29 C.F.R. § 541.602(a)(1). But of course these principles cannot be properly evaluated or applied without knowing what the employee's workweek is in the first place.

As another illustration, one scenario in which such an employee may be paid less than the full salary consistently with the salary-basis requirement has to do with the first or last workweek of his or her employment. In each of those situations, an employer may pay a proportionate part of an employee's salary for the time actually worked in that workweek. 29 C.F.R. § 541.602(b)(6). Again, this exception can be correctly invoked only with reference to the employee's established workweek.

## A Separate Exempt-Employee Workweek?

The FLSA recordkeeping regulations do not require that the *same* workweek be adopted for both non-exempt and exempt employees. On the contrary, employers may select different workweeks for these subgroups, and management might conclude that there are good reasons to do so.

For example, it might be that an employer uses a Thursday-through-Wednesday workweek for non-exempt workers to accommodate the steps that are necessary to compute wages based upon those employees' varying hours worked. However, if the employer's salaried, white-collar-exempt employees typically work from Monday through Friday, then perhaps it would make more sense to adopt a Monday-through-Sunday workweek for them, particularly when it comes to applying the limited exceptions permitting management to pay less than an employee's full salary in certain circumstances.

### **The Bottom Line**

Every employer should confirm:

- ◇ Whether it is required to select a workweek that will apply to employees treated as exempt under one FLSA provision or another, and
- ◇ If it is, whether it has made that selection and has committed the choice to writing.

Management should also take into account any applicable laws or regulations of another jurisdiction that might impose workweek-related requirements or restrictions that are different from the FLSA's.