

DOL Clarifies That Exempt Employees May Take Additional Hourly Shifts Under Some Circumstances

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A recent U.S. Department of Labor (DOL) opinion letter, FLSA2026-5, addresses whether an employee who is exempt from overtime pay under the Fair Labor Standards Act (FLSA) can take on additional non-exempt work for hourly pay without losing their exempt status.

THE SITUATION

An employer classified certain nursing specialists as exempt and paid them on a salary basis, while also allowing them to pick up shifts as hourly staff nurses. These additional shifts were extensive, sometimes approaching 40 percent of their total work hours.

THE BACKGROUND LAW

To qualify as exempt from overtime, employees must meet a salary level test, a salary basis test, and a primary duties test. The salary level test requires that the employee receive a salary of at least \$684 a week. The salary basis test requires that the employee receive a predetermined salary that is not reduced based on hours worked.

The primary duties test requires the employee's "primary duty" to be the performance of exempt work. Relevant factors include the relative importance of the

employee's duties, time spent on exempt work, level of discretion in the work, and comparison to non-exempt roles.

MAINTAINING EXEMPT STATUS

Applying these tests, the DOL concluded the nursing specialists remained exempt from overtime pay. Central to that conclusion was the primary duties test. The DOL emphasized that the employees still spent the majority of their time—more than 50 percent—performing exempt specialist work.

The nature of the duties was also important to the evaluation. The specialist role involved higher-level responsibilities, such as developing training programs, identifying learning gaps, and exercising independent judgment. By contrast, the staff nurse role focused on direct patient care. Even though there was some overlap in tasks, the DOL found the specialist duties were more significant to the role overall and therefore remained the employee's primary duties.

On the compensation side, the DOL confirmed that paying hourly wages for the additional non-exempt work did not defeat the exemption. Because the employees continued to receive their full guaranteed salary, the extra pay qualified as permissible additional compensation. So long as the employees continued to receive a sufficient minimum salary and the employer didn't deduct from that minimum salary improperly, additional compensation for salaried employees does not jeopardize or eliminate their exempt status.

However, employers in Wisconsin should take particular care when assessing their exempt employees' engagement in non-exempt work. Wisconsin law is more restrictive than federal law, generally limiting exempt employees to no more than 20 percent of their time on non-exempt work, or 40 percent in certain retail or service settings. This limitation does not apply to the public sector or most nonprofits but could be a significant constraint for private-sector employers. When state and federal law have differing requirements, the employee gets the benefit of the more favorable rule.

CONCLUSION

FLSA compliance is fact specific. However, this opinion letter highlights that in certain situations, salaried exempt employees can maintain their overtime exemption while working hourly shifts. Employers must ensure that the nonexempt work remains secondary to the employee's exempt role. The more hourly shifts an employee takes, the greater the potential that an employee might lose their exempt status, especially under Wisconsin law. Employers should therefore carefully

structure and monitor these dual role arrangements. If you have specific questions, please reach out to a member of the [Boardman Clark Labor & Employment Law Practice Group](#).

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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