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The FLSA's "8 and 80" Overtime Provisions: What You Need to Know

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The Fair Labor Standards Act (FLSA) requires that employers pay most hourly workers for all hours worked plus overtime, calculated at one-and-a-half times the employee's regular rate, based on 40 hours per seven-day workweek. However, certain employers may be eligible to use the "8 and 80" system, in which a two-week, fourteen-day time period is used for the calculation. Under this system, it is important to know who is eligible, how it works, what are the most common mistakes, and whether it is beneficial to your company.

1. Who is eligible to use the "8 and 80" overtime system?

Pursuant to Section 7(j) of the FLSA, "an institution primarily engaged in the care of the sick, the aged or the mentally ill or defective who reside on the premises" may use the "8 and 80" system. As such, the "8 and 80" system is available for hospitals, skilled nursing care facilities, intermediate care facilities and nursing and personal care facilities for mentally challenged individuals.

2. How does the "8 and 80" overtime system work?

The "8 and 80" system has three requirements. First, the employer and employee must have an agreement to use the "8 and 80" system before any work is performed. Ideally, this information is provided to a prospective employee during the application process and thoroughly reviewed during orientation. A written agreement is not required; however, handbooks should clearly indicate the "8 and 80" system will be used if the employee so agrees. Additionally, although not required, a written agreement signed by the employee and maintained in the personnel file could be beneficial to the employer in the event that the employee (or the Department of Labor) ever challenges the employer's overtime practices.

Second, the "8 and 80" system requires employers to pay overtime for every hour worked in excess of eight hours per day. For example, if an employee works a 12-hour shift, he/she is owed four hours of overtime regardless of how many total hours are worked during the 14-day work-period.

Third, the "8 and 80" system requires the employer to pay overtime for every hour worked in excess of 80 hours during the 14-day work period. Credit can be taken for any overtime paid in excess of eight hours per day. For example, if an employee works 84 hours in the work period, he/she would be due four hours of overtime. If that same employee had worked a 12-hour shift during that work period and the employer paid overtime on the four hours in excess of eight per day, then no additional overtime would be due for that work period.

3. What are the most common mistakes?

The most common mistake is not paying overtime for hours worked in excess of eight hours per day. Some employers believe (incorrectly) that overtime is only due if the employee works in excess of 80 hours during the two-week work period. That simply is not the case.

Other mistakes include failing to correctly calculate the employee's regular rate by omitting shift differential pay and performance-based bonuses, failing to add hours worked in more than one department or at more than one facility when determining the total hours worked, failing to include time spent while performing on-call assignments, and alternating between the regular 40-hour, 7-day workweek system and the "8 and 80" system in an effort to avoid overtime.

4. Does it make sense for your company?

To determine if your company is eligible to use the "8 and 80" system, you will need to "run the numbers." If your employees typically work 12-hour shifts, the "8 and 80" system will likely be cost prohibitive. For example, if a nurse typically works 12-hour shifts, three in the first week (36 hours) and four in the second (48 hours), under the regular 40-hour, one-week overtime system, he/she would be owed no overtime in the first week and eight hours in the second. However, under the "8 and 80" system, he/she would be owed 12 hours (three days x four additional hours per day) in the first week and 16 hours (four days x four additional hours per day) in the second week, for a total of 28 overtime hours (no additional overtime would be due for the four hours in excess of the 80 hours worked in those two weeks as he/she had been paid daily overtime).

If the "8 and 80" system would be beneficial to your company and if your employees agree to work under that system, please consult with a wage-and-hour attorney to ensure that you correctly transition to the system, as special overtime calculations will be required during the transition.