

Certain employees are exempt from overtime and hours of work. Who are those employees?



QUESTION

Certain employees are exempt from overtime and hours of work. Who are those employees?

ANSWER

Employees who perform management functions **primarily** are exempt from overtime.

These are functions that affect the control and direction of a business. Job titles have no impact on whether employees are exempt or not. Employees with the power to make a final decision in most issues without needing approval, of another person are likely performing management functions.

WHY IS IT RIGHT

Managers and overtime pay

As we've explored in a previous post, most workers are entitled overtime pay at time-and-a-half of their regular wage after working 44 hours in a single work week. This applies to both workers who are paid a salary and those who receive an hourly wage.

However, not all employees are entitled to overtime. In fact, for a surprising number of workers overtime pay is not a statutory entitlement.

Lawyers, healthcare and IT professionals, teachers and engineers are, among others, professions that are exempt from employment legislation regarding overtime pay. Furthermore, most managers and supervisors are also not entitled to overtime pay.

We say 'most' managers and supervisors are not entitled to overtime pay because not everyone with 'manager' or 'supervisor' in their job title does work that fits this description.

To qualify as a 'manager' or 'supervisor' for the purpose of overtime pay, the work they do must be predominantly managerial or supervisory. Non-managerial tasks must only be performed on an irregular basis.

Generally speaking, managers and supervisors are not entitled to overtime pay *unless* they spend over 50% of their time doing non-managerial work. For example, if you are the bar manager at a restaurant and the majority of your work is bartending, you may be entitled to overtime pay once you have worked more than 44 hours in a week. But, if by contrast, your time working as a bar manager is primarily spent managing the day to day tasks of scheduling workers, ordering supplies, resolving conflicts and organizing operations, you would likely not be entitled to overtime pay for working more than 44 hours. However, if a bar manager who normally spends most of their working hours doing managerial work must suddenly cover a shift for a regular employee in addition to their managerial duties, they be entitled to overtime pay for the extra hours they work doing the non-managerial tasks.

Takeaway for employers

Calling someone a manager or a supervisor does not necessarily make it so. Do not assume that just because your employee is called a manager that they are not ever entitled to overtime pay. Calling someone a manager just to avoid overtime compensation is not acceptable. The nature of their work is what entitles them to overtime, not their official job title.

OVERTIME IMPORTANT INDICES

Overtime pay

Overtime pay is $1\frac{1}{2}$ times the employee's regular rate of pay. (This is often called "time and a half.")

For example, an employee who has a regular rate of \$17.00 an hour will have an overtime rate of \$25.50 an hour ($17 \times 1.5 = 25.50$). The employee must therefore be paid at a rate of \$25.50 an hour for every hour worked in excess of 44 in a week.

No overtime on a daily basis

Unless a contract of employment or a collective agreement states otherwise, an employee does not earn overtime pay on a daily basis by working more than a set number of hours a day. Overtime is calculated only:

- on a weekly basis

OR

- over a longer period under an averaging agreement

Exceptions

Many employees have jobs that are exempt from the overtime provisions of the Employment Standards Act, 2000 (ESA). Others work in jobs where the overtime threshold is more than 44 hours in a work week.

Different kinds of work ("50 per cent rule")

Some employees have jobs where they are required to do more than one kind of work. Some of the work might be specifically exempt from overtime pay, while other parts might be covered. If at least 50 per cent of the hours the employee works is in a job category that is covered, the employee qualifies for overtime pay.

When an employee does two kinds of work

Gerard works for a taxi company both as a cab driver and as a dispatcher in the office. Working as a cab driver he is exempt from overtime pay but working in the office as a dispatcher he is not.

During a work week, Gerard worked 26 hours in the office and 24 hours driving a cab, for a total of 50 hours. This is six hours over the overtime threshold of 44 hours.

Because Gerard spent at least 50 per cent of his working hours that week as a dispatcher (a job category that is covered), he qualifies for six hours of overtime pay.

When an employee has more than one regular pay rate for overtime work performed

An employee who is paid on an hourly basis may perform, in one work week, two types of work, each of which attracts a different hourly rate. In that case, the employee has two regular rates and, as a result, the overtime rate for each hour of overtime is based on the regular rate that applies to the work performed in that hour. See example below.

An employee works as a punch press operator earning \$17.00/hour and also as a shipping logistics coordinator earning \$20.00/hour for the same employer. The employee's overtime threshold is 44 hours and the overtime rate is 1.5 times the regular rate.

In one work week, the employee worked four hours of overtime. The 45th and 46th hours were worked as punch press operator and the 47th and 48th hours were worked as a shipping logistics coordinator. This employee's overtime pay entitlement would be calculated as follows:

45th hour overtime rate is $\$17.00 \times 1.5 = \25.50 per hour

46th hour overtime rate is $\$17.00 \times 1.5 = \25.50 per hour

47th hour overtime rate is $\$20.00 \times 1.5 = \30.00 per hour

48th hour overtime rate is $\$20.00 \times 1.5 = \30.00 per hour

The total overtime pay due to the employee is \$111.00 [$\$25.50 + \$25.50 + \$30.00 + \30.00]

Agreements for paid time off instead of overtime pay

An employee and an employer can agree electronically or in writing that the employee will receive paid time off work instead of overtime pay. This is sometimes called "banked" time or "time off in lieu."

If an employee has agreed to bank overtime hours, they must be given $1\frac{1}{2}$ hours of

paid time off work, at the applicable overtime rate, for each hour of overtime worked.

Paid time off must be taken within three months of the week in which the overtime was earned or, if the employee agrees electronically or in writing, it can be taken within 12 months.

If an employee's job ends before they have taken the paid time off, the employee must receive overtime pay. This must be paid no later than seven days after the date the employment ended or on what would have been the employee's next pay day.

Calculating overtime pay

The manner in which overtime pay is calculated varies depending on whether the employee is paid on an hourly basis, on a fixed salary, or has a fluctuating salary. Overtime pay calculations may also be affected by public holidays.

Averaging agreements

Interactive tools are available online; please refer to the "Averaging and time off in lieu" section in the hours of work and overtime tool.

Sometimes employees need to work variable hours to meet family responsibilities. For example, perhaps an employee needs to take a child once a month for a day of special medical treatment but cannot afford to lose a day's pay. Instead the employee would like to work extra hours in the preceding weeks, to make up the time.

Likewise, employers may need employees to work extra hours during a peak period, in order to fill customer orders.

An employer and an employee can agree in electronically or in writing to average the employee's hours of work over a specified period of two or more weeks, up to a maximum of four weeks, for the purposes of calculating overtime pay. Under such an agreement, an employee would only qualify for overtime pay if the average hours worked per week during the averaging period exceeds 44 hours.

For example, if the agreed period for averaging an employee's hours of work is four weeks, the employee is entitled to overtime only after working 176 hours during the four work weeks ($44 \text{ hours} \times 4 \text{ weeks} = 176 \text{ hours}$). Note that averaging periods cannot overlap one another and must follow one after the other without gaps or breaks.

Where a union does not represent employees, averaging agreements must contain an expiry date that cannot be more than two years from the date the averaging agreement takes effect. Where the agreement applies to unionized employees, the expiry date cannot be later than the day the next collective agreement takes effect.

An averaging agreement cannot be revoked by either the employer or employee(s) before its expiry date, unless both the employer and employee(s) agree in electronically or writing to revoke it.

For example, if you worked ten hours per day for five days, you would have 10

hours of overtime using the first method (2 overtime hours each day) and 6 hours using the second method (50 hours worked less 44 hours in a work week). Your overtime is the greater amount and so would be 10 hours.

A work week

Under the Employment Standards Code, a work week is either:

- the time between midnight one Saturday and midnight the next Saturday;

OR

- seven consecutive days that are established as the work week by your employer's practice. For example, if your company works on a Friday to Thursday schedule, that would be considered the work week.

What cannot be done

An employer and an employee cannot agree that the employee will give up their right to overtime pay under the ESA. Agreements such as these are **not** allowed and would be deemed void. However, an employee can make an agreement to take paid time off in lieu of overtime pay or to average hours of work for overtime pay purposes.

An employer cannot lower an employee's regular wage to avoid paying time and a half after 44 hours (or another overtime threshold that applies) in a work week. For example, if Josée's regular pay is \$17.00 an hour, her employer cannot drop her regular rate in a week when overtime was worked to \$15.00 an hour and then pay her \$22.50 ($1\frac{1}{2} \times \15.00) for overtime hours worked instead of \$25.50 ($1\frac{1}{2} \times \17.00).

Overtime hours are the greater of either:

- the total of any hours worked over 8 hours per day each day in the work week;

OR

- the total of any hours worked over 44 hours in the work week.

WHY IS EVERYTHING ELSE WRONG

USEFUL QUESTIONS DEALING WITH OVER-TIME PAY

1. Overtime Payment

Your employer must pay you for overtime hours at 1.5 times your regular wage rate.

2. Can I bank overtime hours and take them as time off later?

Only if you have entered into an overtime agreement with your employer.

3. What is an overtime agreement?

An overtime agreement says that an employee can take time off with regular pay instead of overtime pay. Overtime hours are banked and time off with regular pay

is taken at a later date. The agreement can relate to all overtime pay or part of it.

An overtime agreement can be:

- part of a collective agreement, if you are in a union; or
- a written agreement between you and your employer or a group of employees and your employer. If the overtime agreement is between a group of employees, it can apply to individuals whether or not they were employed by the employer at the time the agreement was made.

There are certain minimum provisions that the Code says apply to all overtime agreement, even if the agreement does not specifically include them. These terms include:

- if time off is not provided, the employer must pay the employee overtime pay at 1.5 times the employee's regular wage;
- time off must be taken within 6 months of the end of the pay period when it was earned. For example, if you are paid at the end of every month, and you banked overtime hours in January, you must take that time off before the end of July;
- the agreement cannot be changed or cancelled without one month's written notice;
- the employer must provide a copy of the overtime agreement to each employee affected by it.

As well, **the law on banking overtime hours changed on September 1, 2019**. The law used to say that, if there was an overtime agreement in place, an employee could take 1.5 hours off for every hour of banked overtime.

As of September 1, 2019, overtime hours can only be banked at straight time. This means an employee can only take one hour of time off for every hour of overtime worked.

If you banked overtime hours before September 1, 2019 and have not yet taken the time off, you can still take 1.5 hours off for every overtime hour worked (unless your overtime agreement or collective agreement provides for a higher rate).

The government also repealed (cancelled) Flexible Averaging Agreements, effective September 1, 2019. Existing agreements will remain valid until the earlier of the cancellation date of the agreement or August 31, 2021.

4. Hours of Work Averaging Agreement

An employee or group of employees can enter into an agreement to average the employee's work over a period of 1 to 12 weeks to determine how much overtime pay or time off the employee is entitled to.

An Hours of Work Averaging Agreement can be part of a collective agreement (if you are in a union). It must be in writing. There are several items that need to be included in the Hours of Work Averaging Agreement:

- the start and end date for the agreement, up to a maximum term of two years (except that if it is part of a collective agreement, the Hours of Work

- Averaging Agreement ends when a new collective agreement is entered into);
- the number of weeks over which the hours will be averaged, to a maximum of 12 weeks (unless a permit issued by the Director authorizes a longer period);
 - the scheduled daily and weekly hours of work (should not be more than 12 hours per day and an average of 44 hours per week);
 - how overtime pay or time off with pay will be calculated.

If the Hours or Work Averaging Agreement is between a group of employees, it can apply to individuals whether or not they were employed by the employer at the time the agreement was made.

The employer must provide a copy to each employee to whom the agreement applies.

5. Overtime calculus if paid by commissions

If you are paid entirely on commission, overtime is paid out at minimum wage.

If you are paid partly by salary and partly by commission, overtime is paid out at your salary rate (if it is higher than minimum wage) or minimum wage (if your salary rate is equal to or less than minimum wage).

Most employees are entitled to be paid 1 $\frac{1}{2}$ times their wage for hours worked beyond eight hours in a day or 40 hours in a week. Employees are only entitled to overtime wages for work that is requested, acknowledged or authorized by the employer. In some cases, employees are not entitled to overtime wages because they perform management functions primarily.

6. Employees exempt from overtime

Some employees do not have to be paid overtime, including those who either

- perform management functions primarily; **or**
- have substantial control over their hours of work **and** make at least two times the Manitoba Industrial Average Wage.

7. "Manager" or "Supervisor" exempt from overtime and hours of work

Job titles have no impact on whether employees are exempt or not. The factors that are considered include the nature of their work functions and their level of control and authority in the organization.

8. Exemptions from overtime and hours of work

Employees who perform management functions primarily are exempt from overtime.

These are functions that affect the control and direction of a business.

Employees who have the authority to independently make key business decisions on most issues are likely to be exempt. Employees who only sometimes perform management duties are generally not exempt from overtime and must be paid accordingly.

For example, in a franchise business where all of the major decisions on staff, budget, and marketing are made at the corporate office, employees will likely not be considered to be performing management functions primarily.

9. Management Functions

Employees with the power to make a final decision on most issues without needing approval of another person are likely performing management functions.

Some examples of management functions would include, but are not limited to, the ability to:

- Hire and fire employees
- Change the job duties or wage rates of other employees
- Authorize overtime
- Make decisions on how business dollars are spent
- Act on behalf of the employer

10. Are employees who supervise other employees exempt from hours of work and overtime?

Supervisory duties alone are not usually considered to be management functions. To determine if employees perform management functions primarily, all of their job duties must be examined. One of the questions to consider is who makes the final decision on things like terminations and discipline. Many supervisors make recommendations on these issues, but someone with more authority in the company makes the final decision. Generally, supervisors are not exempt from overtime and hours of work.

11. Who determines if employees primarily perform management functions?

Employers who wish to exclude employees from overtime must be able to show that they are performing management functions primarily.

12. Are managers who take direction from a board of directors exempt from hours of work and overtime?

It depends on the level of authority the manager has been given to make decisions affecting the business. Many factors may be considered, including: how active the board of directors is in the day-to-day operation of the business, how involved they are in monitoring expenditures, and whether the manager has the authority to interpret and implement board policies and procedures.

Understanding overtime in Canada ensures you're paying employees fairly when they work more hours than the normal work period. In most Canadian provinces, the overtime rate is 1.5 times the employee's standard compensation, and it's typically paid after an employee works more than eight hours per day or 40 hours per week. There are quite a few exceptions based on location, position, and payment structure.

ELEVEN INDUSTRIES THAT HAVE DIFFERENT RULES FOR OVERTIME

1. Ambulance attendants: overtime hours are the greater of hours over 10 hours per day in the work week OR hours of work over 60 hours in the work week.

2. Employees doing field catering, geophysical exploration (but not engineers), land surveying, logging and lumbering – all further than 16km outside a town or city: overtime hours are the greater of hours over 10 hours per day in the work month OR hours of work over 191 hours in the work month. (If you stop working during a month, the overtime is calculated differently.)

3. Employees of a town or city or Métis settlement doing road construction, road maintenance or snow removal from roads: overtime hours are the greater of hours over 10 hours per day in the work month OR hours of work over 191 hours in the work month. (If you stop working during a month, the overtime is calculated differently.)

4. Employees going brush clearing, and railway or road construction (including maintenance) outside of a city, town or village: overtime hours are the greater of hours over 10 hours per day in the work week OR hours of work over 44 hours in the work week.

5. Employees of an irrigation district (except for office employees) who are employed full time and paid wages on a monthly basis: overtime hours are the greater of hours over 9 hours per day in the work week OR hours of work over 54 hours in the work week.

6. Employees working in a nursery or greenhouse: overtime hours are the greater of hours over 9 hours per day in the work week OR hours of work over 48 hours in the work week.

7. Oilwell servicing industry: overtime hours are the greater of hours over 12 hours per day in the work month OR hours of work over 191 hours in the work month. (If you stop working during a month, the overtime is calculated differently.)

8. Taxi cab drivers: overtime hours are the greater of hours over 10 hours per day in the work week OR hours of work over 60 hours in the work week.

9. Truck drivers and bus drivers (except those who work only within a city): overtime hours are the greater of hours over 10 hours per day in the work week OR hours of work over 50 hours in the work week.

10. Caregivers (providing home care or residential care):

- Where the caregiver is employed for a 24-hour shift: overtime hours are any hours over 264 hours in a work month and ;
- Where the caregiver is employed for less than a 24-hour shift: overtime hours are the greater of hours over 12 hours per day in the work month OR hours of work over 264 hours in the work month.

11. Fire-fighters: overtime hours are the greater of a firefighter's regularly scheduled work shifts in that work week OR an average of 44 hours per week (averaged over the period of the current cycle).

NO ENTITLEMENT TO OVERTIME PAY

- Waged, non-family farm and ranch employees;
- Lookout observers;
- Supervisors or managers;
- Employees working on matters of a confidential nature;
- Salespeople who:
 - solicit orders mainly outside of their employer's place of business and who are paid in part or in full by commission;
 - sell automobiles, recreational vehicles, trucks or buses;
 - sell manufactured homes;

- sell farm machinery;
- sell heavy duty construction equipment or road construction equipment;
- are employed by a home builder to sell residential homes;
- Real estate brokers;
- Dealers or advisers who trade securities;
- Insurance agents who are paid only on commission;
- People who engage in a direct selling business under a direct selling business license (under the *Consumer Protection Act*);
- Land agents licensed under the *Land Agents Licensing Act*;
- Extras in a film or video production;
- Counsellors or instructors at an educational or recreational camp that is operated on a charitable or not-for-profit basis for children or handicapped individuals or for religious purposes;
- Registered architects, restricted practitioners or visiting project architects;
- Accountants;
- Chiropractors;
- Dentists and denturists;
- Engineers (including members-in-training);
- Lawyers (including students-at-law);
- Optometrists;
- Podiatrists;
- Psychologists;
- Veterinarians;
- Agrologists (including agrologists in training);
- Information systems professionals (employees mainly engaged in investigating, analyzing, designing, developing, implementing, operating or managing information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment).