



HIGHLIGHTS

- On May 28, 2026, the DOL issued Opinion Letter FLSA2026-5, addressing the overtime implications when an exempt employee performs additional work in a secondary, nonexempt role at an hourly rate.
- The DOL advised that the employee in question remained exempt under the FLSA's minimum wage and overtime requirements even though the employee performed some nonexempt work and received additional hourly compensation for that work because the employee's primary duties remained the performance of qualifying exempt work, and the employee's pay exceeded the minimum salary level requirement and met the salary basis requirement.

DOL Addresses Overtime Implications for Exempt Employees Performing Additional Hourly Work

On May 28, 2026, the U.S. Department of Labor (DOL) issued Opinion Letter [FLSA2026-5](#), addressing the overtime implications when an exempt employee under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) performs additional work in a secondary, nonexempt role at an hourly rate. The letter addresses a situation involving an individual employed by an academic medical center operating a nonprofit acute care hospital in two capacities, as an exempt nursing professional development specialist and as a nonexempt staff nurse.

Background

The FLSA generally requires employers to pay nonexempt employees at least the federal minimum wage for every hour worked and 1.5 times their regular pay rate for each hour worked over 40 in a workweek. Section 13(a)(1) of the FLSA exempts from both minimum wage and overtime pay any employee employed in a bona fide executive, administrative or professional capacity. To qualify for the exemption, an employee must satisfy the following three tests:

1. **Salary basis test**—The employee must be paid a predetermined and fixed salary that is not subject to reduction based on variations in the quality or quantity of work performed;
2. **Salary level test**—The amount of the salary paid must meet a specified minimum amount. The current standard salary level is \$684 per week (\$35,568 per year); and
3. **Duties test**—The employee's job duties must primarily involve those associated with duties outlined by the exemption.

If an employee performs work in both exempt and nonexempt roles in the same workweek, the employee meets the duties requirements for an exemption if the employee's primary duty remains the performance of exempt work. An employee who spends more than 50% of their time performing qualifying exempt work will generally satisfy the primary duty requirement. Factors to consider when determining an employee's primary duty include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties, the amount of time spent performing exempt work, the employee's relative freedom from direct supervision, and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. Job titles and salary wages alone do not determine exempt status.

Key Highlights

The employee at issue performed work in both an exempt capacity (e.g., nursing professional development specialist) and a nonexempt capacity (e.g., staff nurse) in the same workweek. The DOL states that the employee's primary duties remained the performance of qualifying exempt work (e.g., nursing professional development specialist) even when the employee worked additional shifts performing nonexempt

work (e.g., staff nurse) because the substantial majority of the employee's time (i.e., approximately 40 hours per workweek) was spent in the exempt role.

The employee's pay in the nursing professional development specialist role exceeded the minimum salary level requirement and met the salary basis requirement for the FLSA exemption. The DOL noted that an employer may provide an employee with additional compensation without violating the FLSA's salary basis requirement, including additional compensation based on hours worked for work performed beyond the normal workweek. Therefore, the additional hourly compensation that the nursing professional development specialist received for work performed while working some hourly shifts as a staff nurse did not violate the FLSA's salary basis requirement or defeat the exemption.

The DOL concluded that the employee remained exempt under the FLSA's minimum wage and overtime requirements even though the employee performed some nonexempt work and received additional hourly compensation for that work.

Employer Takeaway

Opinion letters provide the DOL's official position on how labor and employment standards apply in specific situations, and employers that rely on them may be able to assert a good-faith defense. Employers should review the scenario discussed in the opinion letter and determine whether the guidance affects their employment and payroll practices. Employers using dual-role arrangements for exempt employees should ensure that exempt work satisfies all three FLSA exemption tests.