



# BULLETIN

January 1996

## HR Question

### Can Pay Rates Differ for Employees Working in Dual Capacities?

**Question:** Joe works for the XYZ Company as an engineer. However, to earn extra money for the holidays, he volunteered to work on the weekends to clean the company's carpeting and change light bulbs. Must the company pay him at his regular rate to perform this extra work?

**Answer:** No. There is no legal requirement that an employer pay its employees the same rate for all types of work performed. Subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA), the rate to be paid is subject to agreement between the employer and the employee prior to the performance of the work. Thus, if Joe agrees to accept a lower rate of pay for changing light bulbs than for performing the duties of an engineer, the employer may pay him a lower rate for these non-engineering duties.

When an employee agrees to perform other duties that result in more than 40 hours worked per week, the employer's obligation for overtime pay must also be considered. Assuming that Joe performs the duties of a professional engineer during his regular work hours, his engineering work would be considered exempt from the overtime pay requirements of the FLSA. Thus, such hours are not counted when determining Joe's eligibility for overtime pay based upon his performing the nonexempt maintenance duties.

Another issue to be considered when an exempt employee performs nonexempt work is whether or not the additional duties may eliminate the employee's exempt status. If Joe earns less than \$250 per week, he is

considered exempt as a professional employee if the following criteria are met:

- (1) His primary duty must be either (a) work requiring advanced knowledge in a field of science or learning, (b) original and creative work in an artistic field, or (c) teaching, tutoring, instructing or lecturing as a certified or recognized teacher in a school system or educational establishment.
- (2) His work must require the consistent exercise of discretion and judgment.
- (3) His work must be (a) predominantly intellectual and varied in character and (b) of a type that the result or output cannot be standardized in relation to a time period.
- (4) Time spent in duties that are not an essential part of and related to his professional responsibilities may not be more than 20 percent of his weekly hours worked.
- (5) He must receive a salary of at least \$170 per week.

Thus, if Joe earns less than \$250 per week and spends more than 20 percent of his weekly hours cleaning carpeting and changing light bulbs, his exempt status would be destroyed.

If Joe earns at least \$250 per week, a "streamlined" test of the above criteria is applied to determine his exempt status. Assuming that Joe's salary qualifies him for the streamlined test, the FLSA regulations require that his primary duties fall within the definition of exempt work for him to

be considered exempt. Although there is no required percentage of work that must be established to demonstrate an employee's primary duty consists of exempt work, one rule of thumb is that at least 50 percent of the employee's work must be exempt. Thus, the employer should monitor the ratio of Joe's engineering work to his maintenance work performed does not inadvertently render him a nonexempt employee for all work performed.

If Joe's full-time job was in a nonexempt capacity, for example as a truck driver, the employer would be required to add together Joe's hours worked for both jobs and pay him overtime for all hours worked in excess of 40 in one week. The base rate upon which any overtime would be paid is determined by calculating Joe's average straight time rate, determined by dividing total straight time compensation for the week in both jobs by the total straight time pay. Thus, Joe's weekend hours could be paid at an overtime rate based upon a higher base rate than what he would have received for the maintenance duties performed during the first 40 hours worked.

The employer may soften this result by obtaining Joe's agreement, in advance of his performing the maintenance work, that any overtime incurred will be paid at the employer's regular pay rate for this type of work performed during those overtime hours. Thus, if he changed light bulbs on the weekend and has already worked 40 hours as a truck driver, he can be paid based on the regular rate paid to employees for changing light bulbs.

*By Janet E. Lanyon*