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Is the 8 and 80 Overtime Exception for Hospitals and Health Care Providers the Right Fit for Your Company?

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The Fair Labor Standards Act (FLSA) requires that employers pay most workers at least minimum wage for all hours worked, plus overtime – one and one-half the employee's regular rate of pay – for all hours worked in excess of 40 hours per seven-day workweek. However, certain health care employers may be eligible to use a different method, referred to as the 8 and 80 system, that stretches the overtime requirement over a 14-day period. This system allows employers to have more flexibility in scheduling without incurring overtime. For example, a nurse could work six eight-hour shifts the first seven days (48 hours), and as long as he/she works only four more eight-hour shifts (32 hours) during the second seven days, he/she has not worked overtime. Depending on how you staff your facility, this flexibility could decrease scheduling headaches and overtime. The exception is narrow, though, so it is important to know who is eligible, how it works, common mistakes and whether transitioning to the system would be beneficial to your company.

Who Is Eligible?

Under Section 7(j) of the FLSA, hospitals and other institutions primarily engaged in the care of the sick, the aged or the mentally ill who reside there qualify for the exception to the standard overtime rule. Thus, hospitals and most inpatient health care facilities such as skilled nursing facilities, assisted living facilities and facilities for the mentally challenged are eligible to pay overtime under the 8 and 80 system. Obviously, some health care companies that provide services for patients who do not reside at the facility may not qualify.

How Does It Work?

The 8 and 80 system has three requirements. First, the employee must agree. The employer and employee must have an agreement or understanding that the employee will be paid under the 8 and 80 system, and the agreement must be in place before the employee performs any work under it. Ideally, the system should be described to a prospective employee during the application process and reviewed during orientation. And though not required, the employee should sign a written agreement that clearly describes how she will be paid overtime under the system. The employee handbook should also make clear that the 8 and 80 system will be used for certain positions if the employee so agrees. The clear notice of the system in the handbook and the written agreement – which should be securely stored in the employee's personnel file – will be helpful if the employee or the Department of Labor ever challenges the employer's overtime practices.

Second, the 8 and 80 system requires an employer to pay an employee overtime for every hour worked in excess of eight hours per day during the 14-day period. For example, if an employee works a 12-hour shift, she is owed four hours of overtime for that day even if she does not work more than 80 hours during the 14-day period.

Third, the system requires the employer to pay an employee overtime for every hour worked in excess of 80 hours during the 14-day period. For example, if an employee works 84 hours in the work period, she is owed four hours of overtime. But credit can be taken for any overtime paid in excess of eight hours per day. Thus, if the employee worked 84 hours during the 14-day period, including one 12-hour day, the employer must pay only four hours of overtime, not four hours in excess of the eight-hour day *plus* four hours in excess of the 80-

hour period. Of course, an employee who works more than 80 hours in the 14-day period is entitled to overtime even if she did not work more than eight hours any day during the period (i.e., 12 shifts at seven hours each day for a total of 84 hours).

What Are the Most Common Mistakes?

The most common mistake made under the 8 and 80 system is not paying overtime for hours worked in excess of eight hours a day. Some employers incorrectly believe this system allows them to pay overtime only if the employee works more than 80 hours during the 14-day period. That simply is not the case. It's the 8 *and* 80 system, not 8 *or* 80.

Another common violation occurs when an employer tries to game the system by alternating between the regular 40-hour, seven-day workweek and the 8 and 80 system to avoid overtime. While an employer can use both the 40-hour system and the 8 and 80 system for different employees in the same workplace, it cannot use both for one employee. An employer should determine which system works best for which positions and stick with its decision. In fact, the Department of Labor cautions employers that the system "may be changed if the change is designated to be permanent and not to evade the overtime requirements."

Other mistakes include: (1) failing to correctly calculate the employee's regular rate by omitting shift differential pay and performance-based bonuses; (2) failing to add hours worked in more than one department or at more than one facility when determining the total hours worked; and (3) failing to include time spent performing on-call assignments.

Does It Make Sense for Your Company?

First, you need to ensure that your company is eligible to use the 8 and 80 system. If so, you need to run the numbers to determine if it would be beneficial. If your employees typically work shifts that exceed eight hours, the 8 and 80 system will likely be cost prohibitive. For example, under the regular 40-hour, seven-day system, a nurse who typically works 12-hour shifts – three in the first week (36 hours) and four in the second (48 hours) – would not be owed any overtime for the first week and only eight hours for the second. But under the 8 and 80 system, the same nurse would be owed 12 hours of overtime in the first week (3 days x 4 additional hours per day) and 16 hours in the second week (4 days x 4 additional hours per day) for a total of 28 hours of overtime.

If the 8 and 80 system would be beneficial to your company, consult with a wage and hour attorney to ensure: (1) it is permitted under the laws of the state in which you operate; (2) you put in place the proper agreements and policies to comply with the exception; and (3) you properly calculate overtime during the transition between systems because special rules apply to protect employees.