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Client Alert: Double Duty, Zero Penalty – DOL Confirms How Employers Can Pay Exempt Employees Hourly for Nonexempt Work Without Losing Exempt Status

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The U.S. Department of Labor (“DOL”) issued [Opinion Letter FLSA2026-5](#), addressing a question that arises in many staffing environments: Can an employee classified as exempt under the Fair Labor Standards Act (“FLSA”) perform additional nonexempt work for the same employer and be paid on an hourly basis without jeopardizing the exemption? The DOL’s answer is yes, provided the employee’s primary duty remains exempt work and the salary-basis requirement continues to be satisfied.

THE SCENARIO PRESENTED TO THE DOL

The opinion letter addressed an academic medical center that employs both staff nurses and nursing specialists. The employer classified staff nurses as nonexempt and paid them hourly, while specialists were treated as exempt employees and paid on a salary basis. However, some specialists occasionally volunteered to work extra shifts as staff nurses (e.g., one or two 12-hour weekend shifts) in addition to their regular full-time specialist responsibilities. For these additional nursing shifts, the employer paid the specialists an hourly rate. The employer asked the DOL whether these specialists could maintain their exempt status while simultaneously performing this nonexempt work for hourly pay.

THE IMPORTANCE OF THE “PRIMARY DUTY” TEST

In its assessment, the DOL emphasized that exempt status largely depends on whether the employee’s primary duty remains exempt work. Although employees who spend more than 50 percent of their time performing exempt duties will generally satisfy the primary-duty requirement, the regulations do not impose a strict percentage test. Rather, the inquiry focuses on the character of the employee’s job as a whole. (By way of reminder, under the FLSA regulations, determining an employee’s primary duty requires a review of all relevant facts, including: the relative importance of exempt duties compared to nonexempt duties; the amount of time devoted to exempt work; the employee’s degree of independence and discretion; and the relationship between the employee’s salary and compensation paid for nonexempt work.)

Applying that framework, the DOL concluded that the specialists remained exempt because the majority of their working time was spent performing the specialist role, including duties such as educational programming, staff development, competency assessments, and other functions requiring significant discretion and judgment. As such, the additional staff nurse shifts represented a supplemental role rather than the employees’ principal function.

ADDITIONAL HOURLY COMPENSATION DOES NOT AUTOMATICALLY DESTROY EXEMPTION

The DOL also clarified that employers may provide compensation *beyond* an employee's guaranteed salary without automatically forfeiting the exemption. Illustrating this principle, the DOL noted that the nursing specialists continued to receive their full predetermined salary each week regardless of hours worked, and therefore their additional hourly pay for staff nursing shifts was merely supplemental and did not undermine the salary-basis requirement.

KEY TAKEAWAYS FOR EMPLOYERS

Opinion Letter FLSA2026-5 provides some comfort to employers that exempt employees *can* perform additional nonexempt work for hourly pay without losing their exemption. However, the opinion letter does not create a blanket rule allowing employers to freely assign extensive nonexempt duties to exempt employees without consequences. Indeed, if an employee loses their exempt status, they become entitled to overtime compensation based on all hours worked and all remuneration received across both roles. As such, employers with similar dual-role arrangements should periodically evaluate whether those employees continue to satisfy all applicable exemption requirements, including whether their primary duty remains exempt work, and whether they continue to receive a guaranteed salary in accordance with FLSA requirements.

Employers with questions about this topic are encouraged to [contact their Bowditch employment attorney](#).