

# FLSA and Georgia law: Figuring overtime pay for commission employees

Georgia's labor code contains no overtime exemption for commission-paid employees, but the federal Fair Labor Standards Act (FLSA) does. Georgia employers largely follow the federal law because it is more stringent than state law. So employees who are paid on a commission basis are exempt from overtime laws, right?

Well, that depends on your definition of "commission."

And that's a problem, because there isn't one. The FLSA doesn't define "commission," and Georgia state law doesn't recognize the exemption. As a result, the definition of "commission" has been left to the courts. Courts decide on a case-by-case basis, so employers lack a clear-cut definition.

## Commission defined?

Some commission situations are well recognized. The FLSA specifically exempts car salespeople from overtime. Employees who are paid flat fees for specific duties (essentially piecework) also may be considered commission employees if employers meet certain tests spelled out in U.S. Labor Department regulations.

FLSA regulations require employers to meet two conditions to meet the commission exemption:

1. The regular rate the employee earns must be at least one-and-one-half times the minimum wage.
2. More than half the employee's compensation must be commissions paid on goods and services sold.

The courts generally interpret any ambiguity in FLSA regulations in favor of the employee. After all, the law was written to protect employee rights. So employers who don't clearly meet these two conditions should not classify the affected employees as exempt.

## Swiftly getting in trouble

The key case in the 11th Circuit is *Klinedinst v. Swift Investments, Inc.* (260 F. 3d. 1251, decided Aug. 6, 2001).

In that case, Tracy Klinedinst worked as an automobile painter in Swift's auto repair and body shop. The auto repair industry maintains a database showing the number of hours generally needed to complete various auto repairs. These hours are known as "flag hours," and Swift multiplied them times Klinedinst's hourly rate to calculate the flat fee he was paid for each job.

Whether he completed the job in fewer or more hours than the flag hours indicated did not matter. He was paid the flat fee regardless.

As a result of this arrangement, neither the employer nor the employee ever kept track of Klinedinst's hours. So when Klinedinst alleged he was eligible for overtime, neither he nor the employer had any way of calculating it.

The lack of record-keeping caused another problem. Because the commission exemption is dependent on the employee's regular rate being at least one-and-one-half times the minimum wage, no one could calculate his

regular rate. FLSA regulations clearly define the regular rate: It's the total paid to the employee and divided by the actual hours worked.

In this case, Swift tried to argue that it never paid Klinedinst less than \$12 per hour, so he never fell below one-and-one-half times the minimum wage. But the appeals court noted that Swift paid Klinedinst at least \$12 *per flag hour*, not for the hours Klinedinst actually worked. Since the regulations require calculations based on hours actually worked, the \$12 per hour figure was irrelevant.

The court ruled that Swift's method of paying Klinedinst did constitute commission—if it did so while still paying him more than one-and-one-half times the minimum wage.

Some courts outside the 11th Circuit have ruled that, to be considered commissions, payment must be proportionately related to the amounts charged to the customers. The Labor Department has taken the position that flat-rate pay systems, such as Swift's, are commissions for the purpose of the exemption.

### **Out of commission?**

The FLSA specifically exempts outside salespeople from commission compensation, but employees like Klinedinst pose unique challenges. When structuring non-salespeople's commission compensation, employers should:

- Make sure that at least half the employee's compensation is derived from commissions from goods or services sold by the business.
- Create a base compensation equivalent to one-and-one-half times the minimum wage.
- Track all hours worked.

**Final tip:** Employers should track their employees' hours worked for workers' comp purposes, as well. Knowing whether or not an employee was on the clock when an accident happened is critical to processing any workers' comp claim.

### **Overtime online resources**

The U.S. Labor Department provides guidance on overtime issues online at **[www.dol.gov/esa/regs/compliance/whd/whdfs23.htm](http://www.dol.gov/esa/regs/compliance/whd/whdfs23.htm)**. The site describes federal requirements and identifies typical overtime problems.

Additionally, the Georgia Department of Labor's employment law page, titled "What Georgia Employers Need to Know," has useful information on all major employment laws facing Georgia employers. It can be accessed at **[www.sos.state.ga.us/firststop/georgia\\_employers.htm](http://www.sos.state.ga.us/firststop/georgia_employers.htm)**. (This page is worth bookmarking for frequent reference.)

**HR Specialist** offers two publications that are great references to have on hand:

- *Overtime and Other Tricky Pay Issues* shows how to limit (or eliminate) overtime, increase productivity, stay out of hot water with the government and keep the lawyers at bay.
- *You and the FLSA* is a concise, practical reference tool on wage-and-hour law. Order both online at **[www.theHRSpecialist.com/store.aspx](http://www.theHRSpecialist.com/store.aspx)**. Click on "Special Reports."