
Coates' Canons Blog: May an Employee Work a Second Job for the Same Employer?

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Toby works for the City of Paradise, N.C., in a full-time, 40 hours-per-week nonexempt position in the finance department. He gets the opportunity to work a second, 17 hours-per-week part-time nonexempt job for the Paradise information technology department in the evenings. Does the city have to pay Toby overtime premium pay for the hours he works in the second job?

Yes. Even though Toby would be happy to make an extra \$15 per hour straight time in the second job and would take the job without the overtime pay, the city must pay overtime premium pay.

Background

Under the Fair Labor Standards Act (FLSA), employers have two kinds of employees: exempt and nonexempt. Exempt employees are those who satisfy the FLSA's salary basis test and either the executive, administrative or professional duties test. Exempt employees need not be paid overtime if they work in excess of 40 hours in a week. Everyone else is considered nonexempt and must be paid time-and-one-half premium pay for hours over 40. For how to determine whether an employee is exempt or nonexempt, see [here](#), [here](#), [here](#), [here](#) and [here](#).

Second, Unrelated Job for the Same Employer

Toby's situation is not unusual. Many employees want to supplement their earnings. Having a second, unrelated job with the same local government that employs them full-time can be very convenient. Local government employers are happy to give their employees a chance to earn more money and to avoid the hassles of advertising and interviewing for a position that is less than full-time and the hazards of hiring someone unknown who may turn out to be a lousy employee.

But this mutually-desired situation is sometimes sidetracked by the employer's realization that if the employee is nonexempt and is eligible for overtime compensation in his first job, then the hours the employee works in the second, unrelated position will count toward overtime. For the purposes of the FLSA, *all* hours worked by a nonexempt employee for the same employer count toward assessing the employee's right to overtime in a given workweek. This is true even where the employee's primary and secondary jobs are in two different departments, as the U.S. Department of Labor's FLSA regulations make clear:

If in any workweek an employee is covered by the [Fair Labor Standards] Act and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed), and pay overtime compensation for each hour worked in excess of the maximum hours applicable

Nonexempt Employee with Second, Nonexempt Job

In Toby's situation, overtime pay is required. But his employer has two options for calculating the overtime pay. Where a nonexempt employee performs two or more different kinds of work for two different hourly rates, the regulations allow the employer and employee to agree in advance that the employee will be paid time-and-one-half of the bona fide regular rate of the job that is performed during the overtime hours. In the absence of such an agreement, the employee's regular rate for that week is the weighted average of both rates. This means, in the words of the regulations, that "his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are

then divided by the total number of hours worked at all jobs.”

Nonexempt Employee with Second, Exempt Job

Where a nonexempt employee takes a second job that is exempt, the employee must be compensated at a time-and-one-half overtime rate for any hours worked over 40. The situation is treated as if the second position was nonexempt rather than exempt.

Exempt Employee with a Second, Nonexempt Job

Where an exempt employee takes a second job that is nonexempt, the hours worked at the second job are paid at the regular straight-time rate for that job. If the employee begins to spend as much or more time in second nonexempt job as he or she does in the original exempt position, the situation may turn in to one of a nonexempt employee with a second, exempt job.

Exempt Employee with a Second, Exempt Job

Where an exempt employee takes a second job that is also exempt, the employee will earn two separate salaries without any additional compensation regardless of how much time the employee spends in either position.

Whose Budget Pays the Overtime?

This is usually where things fall apart. Neither the department where the first job is located nor the department hiring the employee for a second job has a problem with *the other department* paying the extra half-time premium portion of the employee's wages. The first department is understandably unwilling to pay the overtime premium for work that doesn't benefit it. The second department will be paying straight-time if it hires an outsider for the part-time position, so its budget will bear the responsibility for the straight-time hours of the employee's second job. But the second department doesn't want to cover the extra half-time premium pay because from its perspective, if it weren't for the employee's work for the first department, there would be no need to pay overtime.

This isn't really a legal issue. Whose budget the money comes from, or whether this employee can be hired into a second job at all, is a decision for the city or county manager.

Can Employees Waive Their Rights to Overtime?

Suppose Toby is willing to work the second job at a straight-time rate and to waive his right to do so. After all, if he worked a second job for a different employer, he would only get straight-time. Toby would just as soon work for the same local government employer. Can he waive his right to overtime?

The answer to that question is a well-established and resounding, “NO!”. As long ago as 1945, the U.S. Supreme Court held that employers and employees could not agree to terms of payment that violate the FLSA. That foundational principle has been reaffirmed in the years since. See [here](#) and [here](#) to read the Supreme Court cases.

The Occasional and Sporadic Second Job

There is a single, small exception to the second job rule. When a local government employee works a second, unrelated job for the same employer on a part-time basis, but only occasionally or sporadically, the hours worked in the second job do not have to be counted for the purpose of overtime but may be paid at a straight time rate. For the purposes of this exception, the terms “occasional” and “sporadic” mean infrequent, irregular, or occurring in scattered instances. The work may be recurring (an event held every fall or every holiday season), *but it cannot be regular* (weekly or monthly according to a regular schedule). Examples of occasional and sporadic part-time work include:

- taking tickets or providing security for special events such as concerts, team sporting events or lectures at stadiums or auditoriums;
- officiating at special youth or sports events at public recreation and park facilities;
- assisting in food or beverage sales at concerts, sports events or special events such as a county fair.

But if an employee does such work over and over again, however, the job will lose its occasional and sporadic status and be subject to overtime as a second job with the same employer.

Note that to exclude such hours from overtime, the occasional or sporadic work may not be within the same general occupational category as the employee's regular work. Examples of occasional and sporadic activities that are in a different capacity from an employee's regular work include:

- an employee of the finance department *occasionally* refereeing for an adult evening basketball league sponsored by the parks and recreation department;
- a bus driver assisting in crowd control at a winter festival;
- an administrative assistant *substituting* as a coach for a youth basketball team;
- a maintenance engineer providing instruction on auto repair as part of a single-day parks and recreation program.

Examples of occasional and sporadic activities that would **not** be considered in a different capacity from an employee's regular work include:

- a parks and recreation employee primarily engaged in playground maintenance who also from time to time cleans an evening recreation center;
- public safety employees taking on any kind of security or safety function within the same local government – such assignments are **never** considered to be employed in a different capacity.

Finally, the occasional and sporadic work may not be excluded from overtime payment if the employer orders or in any way pressures employees to undertake the work. The decision to work the occasional and sporadic assignment must be made freely. The complete regulation may be found here.

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