



Half an Hour for Health Care

Regular Rate Pain Points in Health Care

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Seyfarth Shaw LLP

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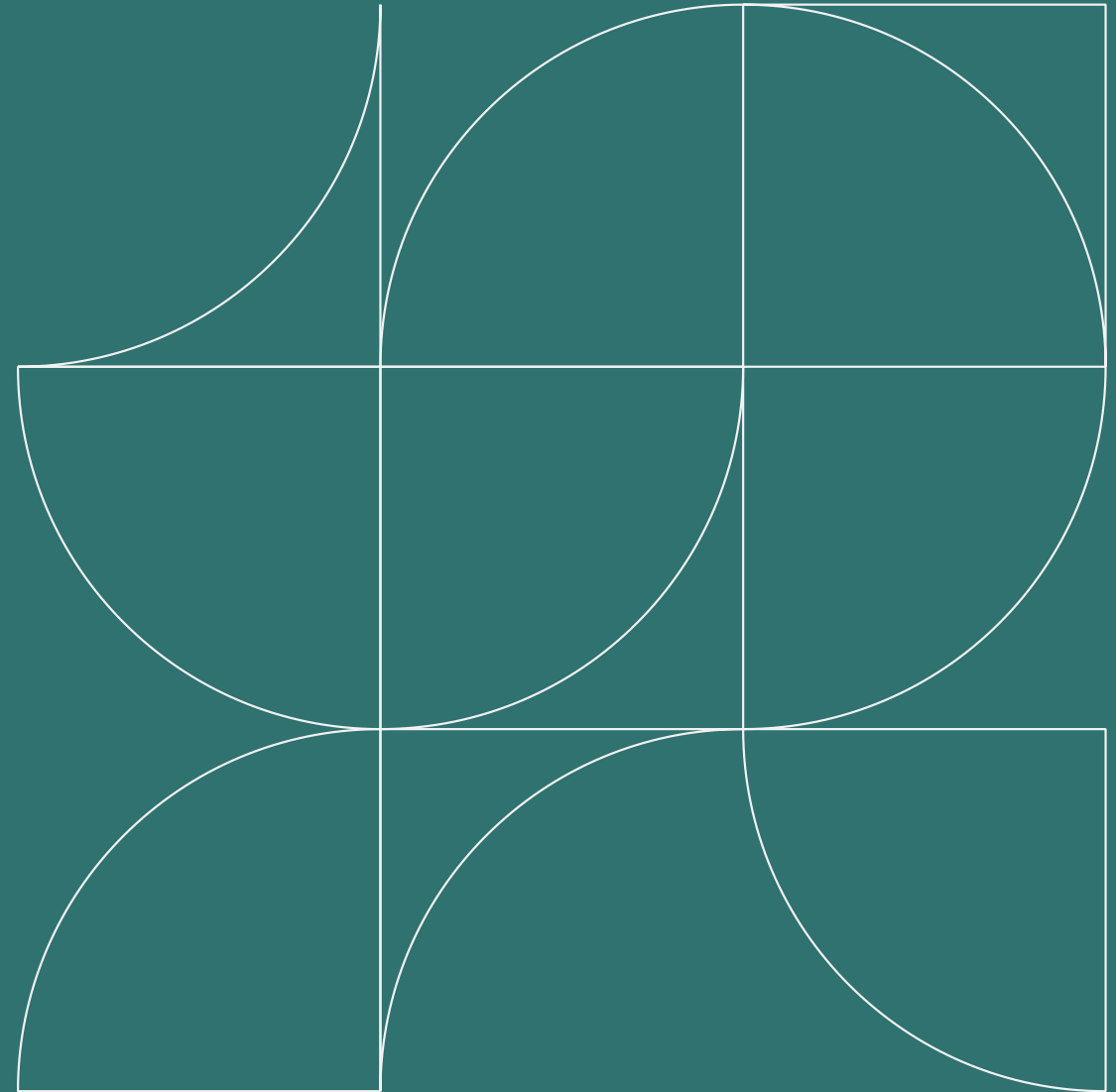
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Agenda

- 1 | Regular Rate of Pay Overview
- 2 | Workdays and Workweeks in Healthcare
- 3 | Compensation in Healthcare
- 4 | Hours Worked in Healthcare
- 5 | The Pain Points

Regular Rate of Pay Overview



Why We Care About The Regular Rate



- The **regular rate** is the weighted average rate of pay that is used for overtime and double time premiums (the .5 and 1.0 premium portions), CA paid sick leave hours, meal and rest period premiums, and reporting time pay.
- Increasing number of class action and PAGA lawsuits focused on regular rate violations right now.
- Healthcare employers are targets because healthcare employees are paid many different premiums, bonuses, differentials, on-call pay, etc.

Regular Rate Basics



- The “regular rate of pay” is the weighted average of the employee’s earnings for the workweek
 - All “remuneration” for employment (i.e., all compensation for work performed), except some statutory exclusions, in the workweek divided by the total hours worked by that employee in the workweek.
 - Where an employee earns compensation in addition to the base rate, the regular rate of pay will be higher than the employee’s base hourly rate.

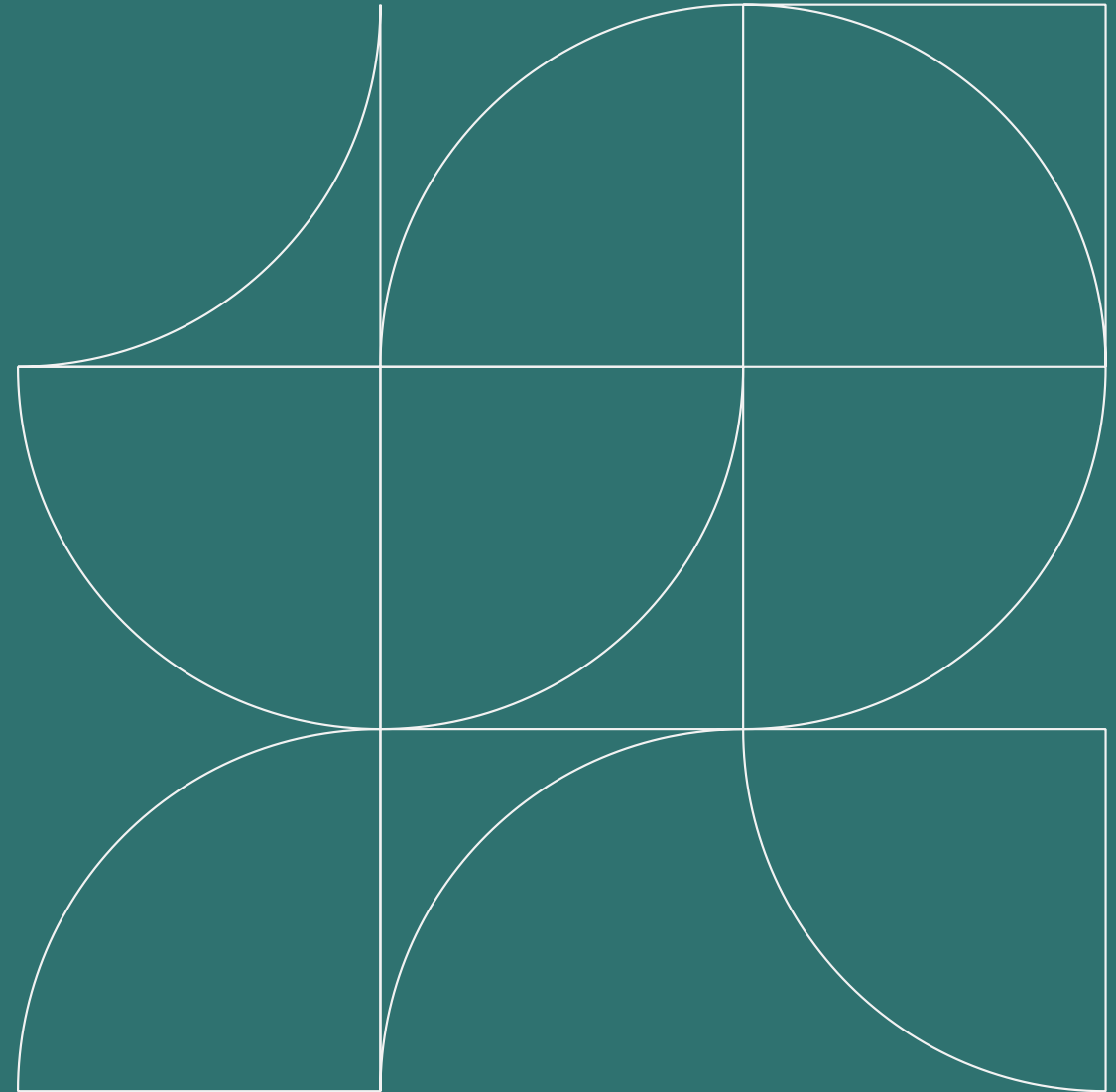
Regular Rate Basics



To calculate an employee's regular rate, you need to know three things:

1. What is their workweek? (i.e. what period of time are we looking at their compensation and hours worked.)
2. What compensation needs to be included in the numerator?
3. What hours need to be included in the denominator?

Workdays and Workweeks in Healthcare



Workdays and Workweeks



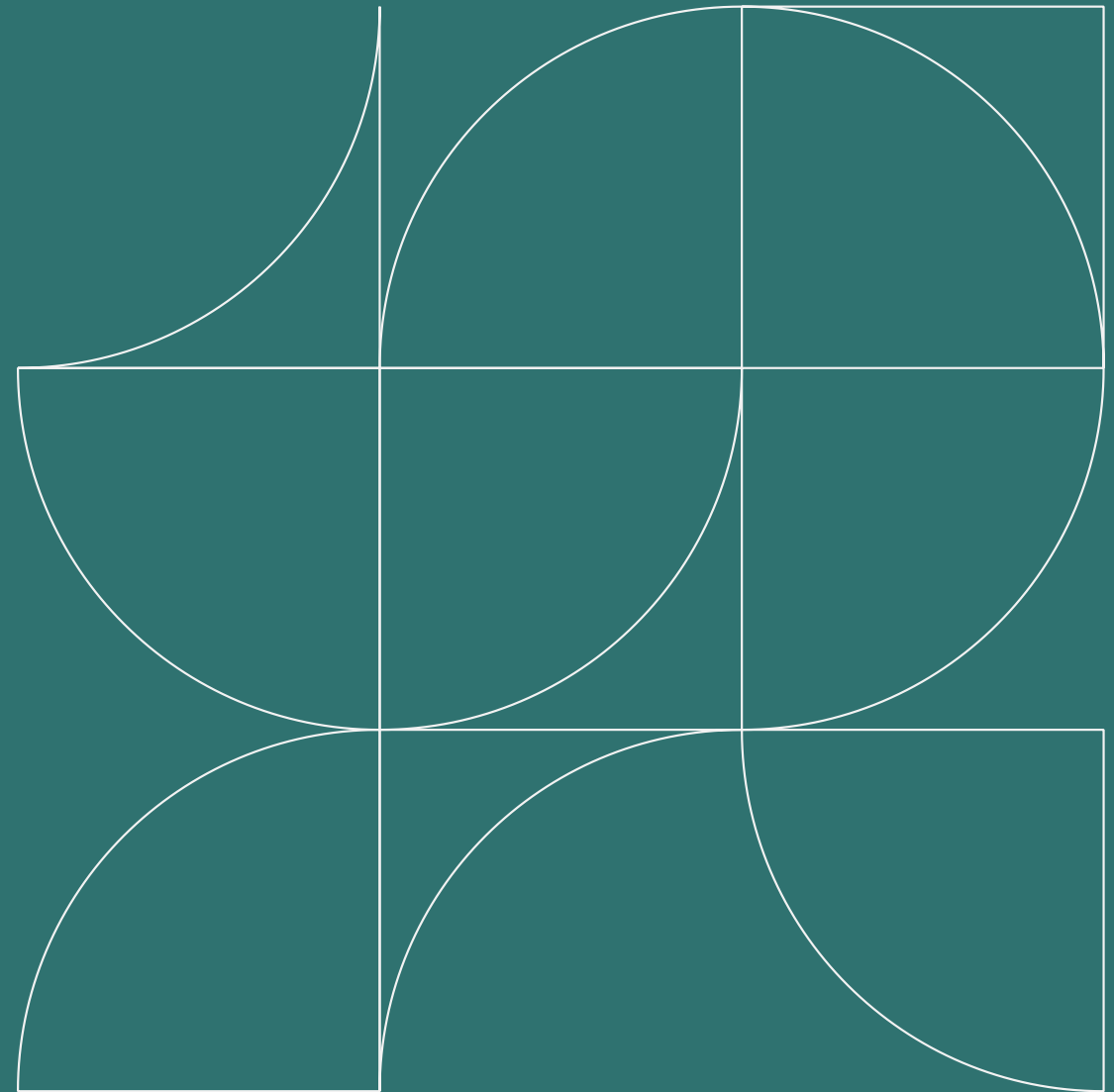
The regular rate is calculated on a workweek basis and both daily and weekly overtime are paid at the regular rate of pay.

The “workday” is a fixed 24-hour period that starts at the same time each day. The “workweek” is a fixed period of seven workdays.

Different employee populations may have different workdays and workweeks, based on their regular work schedule.

- For example, night shift employees may not have a midnight workday/workweek start time.

Compensation in Healthcare: What is Included in the Regular Rate?



What's In? What's Out?



Premium Pay for Certain Hours, Days, or Types of Work

- In:
 - Preceptor pay
 - Hazard pay
 - Shift differentials, extra shift bonuses
 - Standby pay
 - Commissions
- Out:
 - Premium pay for hours worked in excess of a daily or weekly standard (i.e., overtime).
 - Only the premium portion is excluded (i.e., the .5 portion of an overtime rate).
 - Premium pay for work on weekends, holidays, or other special days.
 - As long as the premium is at least 1.5x the employee's base rate.

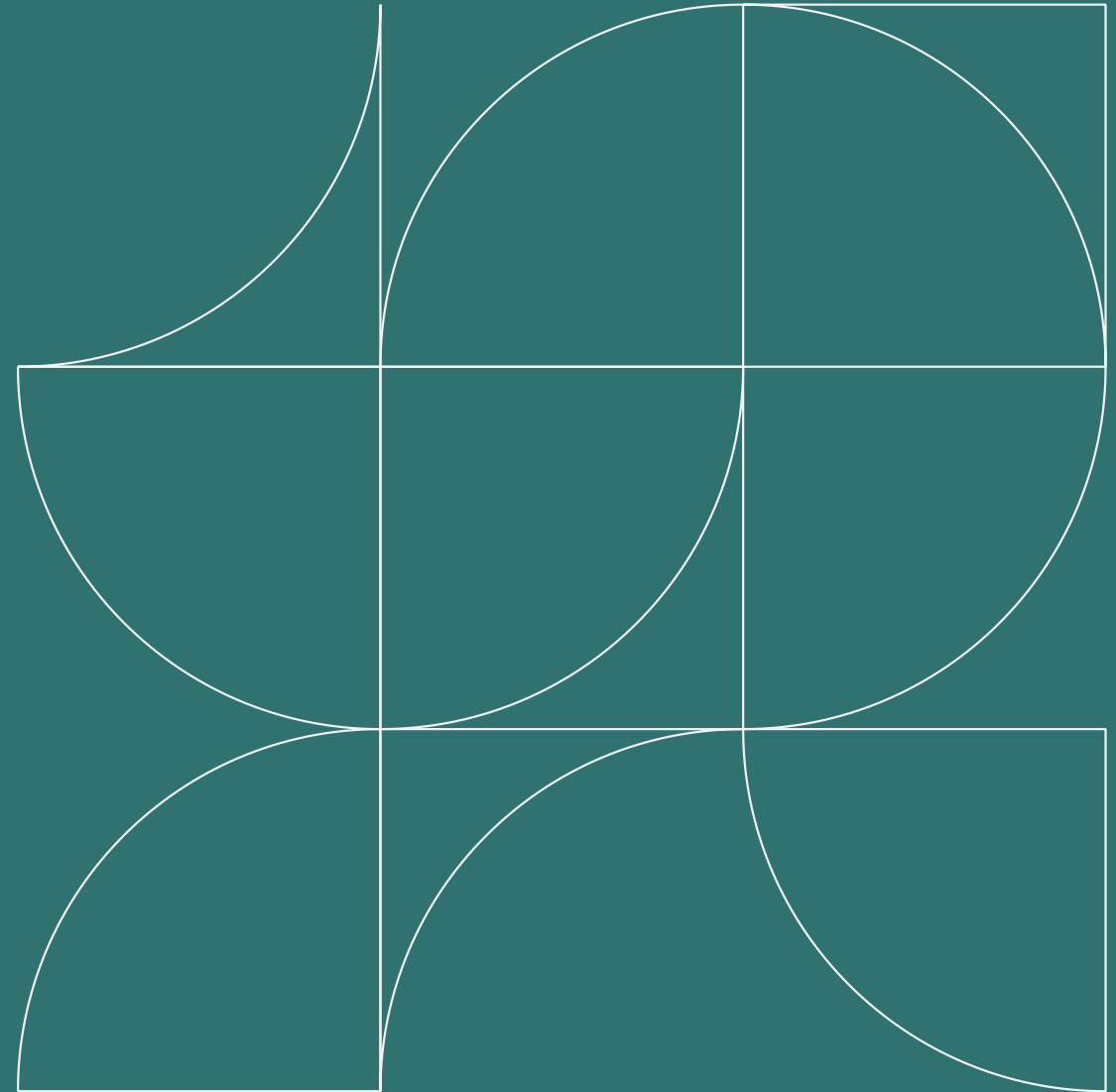
What's In?
What's Out?



Bonuses, Gifts, Benefit Plans

- In:
 - Non-discretionary bonuses
 - Seniority or longevity pay
 - Attendance bonuses
 - Bonuses designed to incent workers to work harder or more efficiently
- Out:
 - Discretionary bonuses (spot bonuses or other unexpected bonuses)
 - Gifts
 - Not based on hours, production, or efficiency
 - Not too large
 - Not pursuant to any agreement
 - % of earnings bonuses
 - Payment to profit-sharing plan or trust
 - Contribution to employee benefit plans

Hours Worked in Healthcare: What is Included in the Regular Rate?



What's In? What's Out?



What counts as “hours worked” for purposes of the regular rate of pay calculation and overtime?

- In: all worked hours, including
 - Regular hours
 - Education time
 - Controlled standby time

 - Out:
 - Meal and rest period premiums
 - Unworked reporting time pay hours
 - Uncontrolled standby time
 - Vacation, Sick Pay, PTO etc.
 - Any “double-counting” of hours already included
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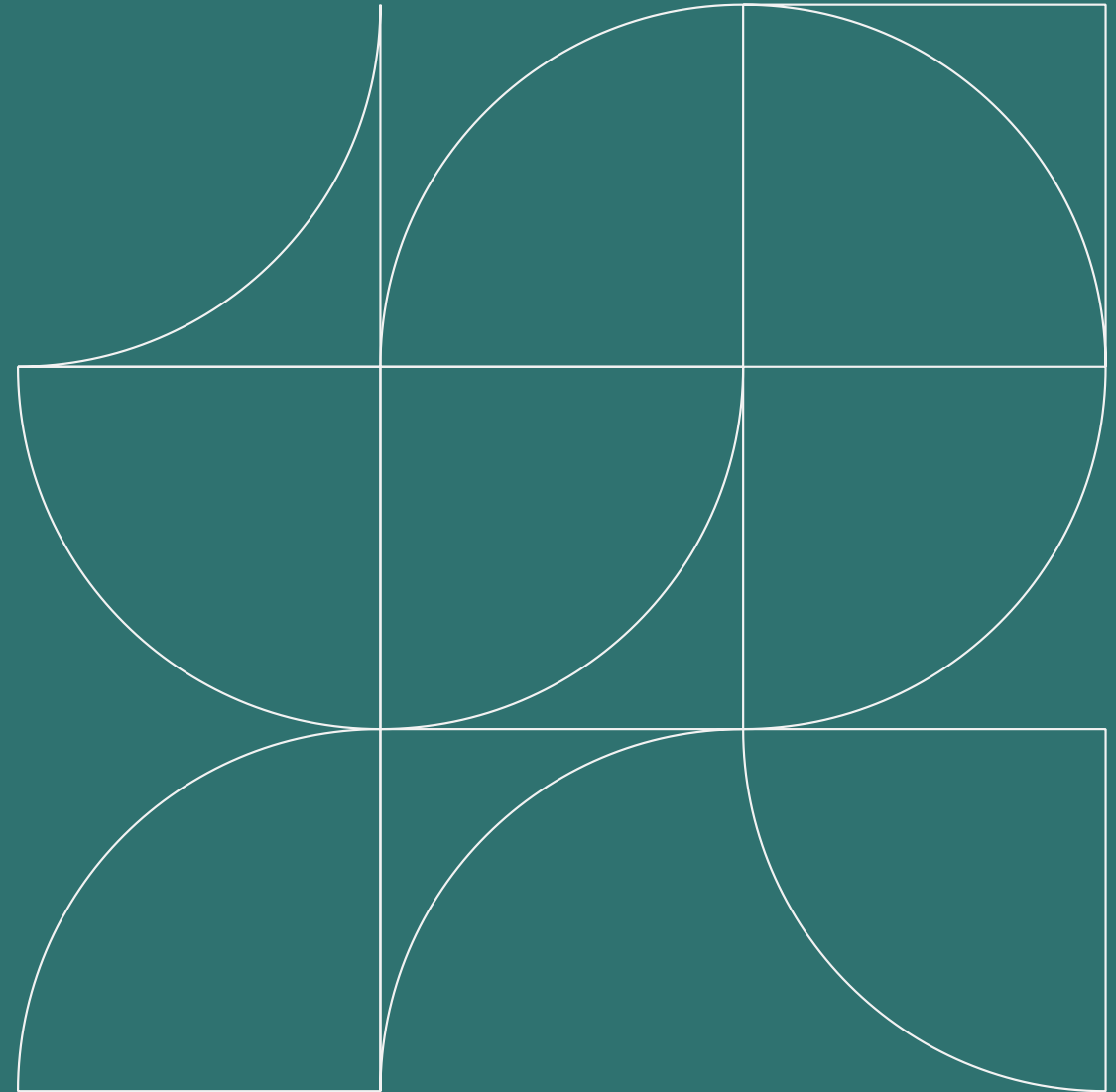
Note About Flat-Sum Bonuses



Flat-sum bonuses are treated differently in California. *Alvarado v. Dart Container Corp. of Calif.*, 4 Cal.5th 542 (2018)

- Flat sum bonuses: those that do not increase or have the potential to increase in proportion to hours worked.
- E.g. attendance bonuses, seniority/longevity bonuses, safety bonuses, and certification bonuses.
- To calculate the additional regular rate for a flat-sum bonus, divide the bonus by the total straight-time hours worked as opposed to all hours worked.

The Pain Points



Why it Matters



- Constant and growing source of litigation in California.
 - Tough to get right! Easy to tell if it's being done wrong.
 - Policy likely applied in a uniform manner (certification).
 - Can be pennies in damages, but huge exposure in derivative claims.
 - Labor Code 203 penalties
 - Labor Code 226 penalties
 - PAGA
-

Advice



- Be Proactive
 - Don't assume that your payroll provider is getting it right.
 - Not only the calculations but how its presented on the wage statements
 - Do an audit of your payroll codes to make sure that they are configured correctly.
 - Ensure that the regular rate and overtime are being calculated correctly for employee populations on different workweeks.

Q & A



Some common questions....

- *Question:* The employees at my hospital are represented by unions. Do I need to worry about the regular rate?
- *Answer:* YES. There is no CBA exemption from overtime under the FLSA, and FLSA overtime (over 40 hours in a week) must be paid at the regular rate of pay. California's CBA exemptions from daily overtime and paid sick leave may not apply to some represented employees, and there is no exemption applicable to the requirement to pay meal and rest period premiums and reporting time pay at the regular rate.

Q & A



- *Question:* The non-exempt employees in administrative roles at my hospital are salaried non-exempt. Do we need to worry about the regular rate of pay for them?
- *Answer:* YES. Salaried non-exempt employees are subject to the same overtime requirements as hourly employees and must be paid overtime (and meal/rest premiums, reporting time pay and paid sick leave) at the regular rate.

Q & A



- *Question:* Some employees receive pay for uncontrolled standby time. Does this need to be included in the regular rate calculation?
- *Answer:* YES. Any compensation that an employee receives for uncontrolled standby time must be included in the numerator for the regular rate calculation. However, the hours should **not** be included in the denominator.

Q & A



- *Question:* Employees receive a discount in the hospital cafeteria should this be included in the regular rate calculation?
- *Answer:* NO. A discount generally does not need to be included as compensation in the regular rate calculation as long as the employee's entitlement to the discount is not contingent on hours worked, job performance etc.



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