

## **Overtime Roulette: Seven Mistakes that Could Cost You**

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The Wage and Hour Division of the Department of Labor, DOL, primarily ensures that employers are in compliance with the Fair Labor Standards Act, FLSA. In short, the FLSA requires that non-exempt employees be paid at least the minimum wage for all hours worked and overtime pay at 1 ½ times their regular rate of pay for all hours worked in excess of 40 hours in a workweek. The FLSA also has child labor provisions which include some restrictions on hours worked for employees under 16 years of age, as well as prohibits youths from working in hazardous occupations.

In 2010, The Department of Labor, DOL, launched a “We can help” <http://www.dol.gov/wecanhelp/> campaign encouraging employees to contact DOL if they believe they are being paid incorrectly. DOL hired celebrities such as actor, Jimmy Smits to help convey its message and commercials are appearing on local television as well as in movie theaters. They also hired more investigators to enforce FLSA requirements and based on our experience it appears that wage and hour audits are on the rise.

Wage and hour auditors normally inspect employer payroll records for the past two years reviewing both current and former employees. However, if it is believed that an employer has willfully violated FLSA provisions, investigators can review payroll records for three years.

In addition, if it is believed that the employer willfully violated the FLSA, the Secretary of Labor may file suit for back wages and an equal amount as liquidated damages. In simplistic terms, if an employer willfully violated the FLSA, the back wages owed can be doubled! The DOL can also enforce civil money penalties of up to \$1,000 for willful and repeated violations. <http://www.dol.gov/whd/regs/compliance/hrq.htm>

### **Seven Common Mistakes Employers Make**

Employers often find it easy to comply with the FLSA’s child labor provisions as well as minimum wage requirements, which in Arizona is \$7.35 per hour. However, the typical FLSA violations employers make are much more complex and often involve overtime, misclassification of employees and not paying for off the clock work.

#### **1. Not paying overtime**

Non-exempt employees are entitled to 1 ½ times their hourly rate for all hours worked in excess of 40 hours per week. Employers often think that if the employee agrees to be paid straight time for hours worked in excess of 40 hours per week, that there isn’t a problem. However, even if an employee agrees to be paid straight time for hours worked in excess of 40 hours per week, paying a non-exempt employee anything other than overtime is a violation of FLSA.

#### **2. Not paying overtime for piece rate or piecework – very common in the construction industry**

Employers must also pay overtime for piecework if an employee works more than 40 hours within a work week. The employee is entitled to one-half of the regular rate for each hour worked above 40 per workweek, in addition to their regular piece rate compensation. The overtime pay due must be computed on the basis of the average hourly rate and is calculated by dividing the total pay for employment in any workweek by the total number of hours worked.

For example, if John Doe is paid on a piecework basis and works 50 hours in a week and earns \$450 in that work week, the employee's regular rate for that workweek would be \$9 per hour. The employee should then also receive an additional \$4.50 for each hour worked over 40 hours – an additional \$45 for the 10 overtime hours worked for a total of \$495.00 for that week.

### **3. Misclassification of employees - (Non-Exempt from overtime earnings vs. Exempt from overtime earnings)**

Classifying employees as non-exempt or exempt is a challenging process, which is often difficult for small businesses, especially if they do not have a human resource professional to assist them. The FLSA requires that jobs meet both a salary test and duties test before being classified as exempt from overtime.

The salary tests looks at both the salary basis and the salary level. When an employer decides to pay an employee a salary the employer is required to pay the salary regardless of the amount or quality of work performed and even if no work is performed. Additionally, the employee's base pay cannot be reduced for partial day absences<sup>1</sup>. For example, if an office closes early as there are few customers and an employee is paid on a salary basis, the employer must still pay the employee's full salary.

The salary level portion of the salary test requires that employees be paid at least \$455 per week or more to be considered exempt from overtime regulations. If a position meets the salary tests then the duties of the position need to be considered to determine if the position is truly exempt.

Common exemptions from FLSA provisions are positions where the job duties are classified as Executive, Administrative and Professional. Outside sales positions and Computer Professionals that make \$27.63 or more per hour are often exempt from FLSA as well. There are also many other exempt positions and often it seems as if there is not a rhyme or reason to the exemption. For example, teachers are considered exempt, but police officers are classified as non-exempt.

Further, just because a position is considered to have some functions in a certain classification does not mean the that position is exempt. The FLSA requires that the employee must perform duties within the exemptions and "meet all prongs of the applicable exemption test." For example, a Payroll Coordinator, may serve some administrative functions, but if the position is not directly related to the management or general business operations or the position does not require the use of independent judgment, the position would be considered non-exempt.

[http://www.iu.edu/~uhrs/flsa/FLSA\\_PP\\_Summary.ppt#288,10,Duties Test](http://www.iu.edu/~uhrs/flsa/FLSA_PP_Summary.ppt#288,10,Duties Test)

Classifying a position as exempt or non-exempt can be complex and challenging. It needs to be based on actual job duties. If there is any question as to the classification of a position it is best to confer with legal counsel.

### **4. Not paying salaried non-exempt employees for hours worked in excess of 40 hours per week.**

Employers have a misconception that an employee that receives a salary is exempt from overtime. However, as illustrated above that is not necessarily the case.

The FLSA does not require that non-exempt employees be paid hourly; you can pay a non-exempt employee a salary. However, salaried non-exempt employees are still entitled to overtime pay for any hours worked in excess of 40 hours in a workweek. For example a secretary could be paid a salary, as long as that employee is still paid overtime for any hours worked in excess of 40 hours per work week.

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<sup>1</sup> Salaried employees can also have their salaries partially reduced, when the employee is on Family Medical Leave and taking time off in accordance with FMLA. <http://www.dol.gov/elaws/esa/flsa/overtime/cr3.htm>

## **5. Allowing employees to work off the clock**

Employers are responsible for compensating employees for all time worked. Even if the employer does not request that an employee do the work, but allows it or benefits from it, the employer is responsible for compensating the employee.

For example if a factory worker turns on equipment or gathers tools before clocking in and the employer is aware of it, the employer is responsible for compensating the individual. Another example, which seems to be common in our technical age is non-exempt employees checking and responding to their work related emails while at home, often via their smart phone. This too is considered hours worked and must be compensated.<sup>2</sup>

## **6. Unpaid breaks and Waiting Time**

Neither federal nor Arizona law require employers to give employees meal or rest periods. However, FLSA requires that any break under 20 minutes to be paid. If an employee takes a break of less than 20 minutes it is to be paid. Lunch breaks of 30 minutes or longer can be unpaid as long as the employee is allowed to use his or her time for their own purposes.

Employers often have non-exempt employees clock out for breaks when the employer is not busy. This is fine as long as the breaks are at least 30 minutes in length and the employee is allowed to use the time for his or her own purposes.

However, if the employer requires that the employee wait, then the employee must be paid for his or her time. The FLSA requires that non-exempt employees must be paid for all the time controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.

For example, while waiting for customers to arrive, a retail cashier sits in a corner of the store and texts her boyfriend. The employer does not allow the cashier to leave the store. Her time is being controlled by her employer and must be compensated.

## **7. Not keeping accurate time sheets**

Employers typically have payroll records and basic contact information for employees, but many employers do not keep employee time sheets. The DOL does not require a certain form for timesheets, but it does state that time sheets for non-exempt employees should show the hours worked each day and the total hours worked each week. To reduce employees from disputing the number of hours worked, it is recommended that employers have employees sign their weekly timesheets. Time cards can also be signed electronically.

Another common mistake is that employers do not keep their timesheets after processing their payroll. The FLSA requires "Records on which wage computations are based should be retained for two years." This includes time cards, piece work tickets, wage rate tables, and work and time schedules, and records of additions to or deductions from wages." "For DOL purposes payroll registers should be kept for a minimum of three years".

If you find that your business is the subject of a DOL audit it is recommended that you seek legal counsel immediately. An experienced employment attorney can guide you through the audit process as well as help you to reduce your risk of double fines.

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<sup>2</sup> Keeping track of non-exempt employees' time spent checking work emails after hours is difficult if not impossible. It is suggested that employers have a written policy that allows only exempt managerial and professional employees access to company computer networks and work e-mails outside of work hours.

More information can be found at:

<http://www.dol.gov/whd/regs/compliance/hrg.htm>

<http://www.dol.gov/whd/regs/compliance/whdfs23.pdf>

<http://www.dol.gov/elaws/esa/flsa/screen75.asp>

<http://www.dol.gov/compliance/guide/minwage.htm>

[http://www.iu.edu/~uhrs/flsa/FLSA\\_PP\\_Summary.ppt#256,1](http://www.iu.edu/~uhrs/flsa/FLSA_PP_Summary.ppt#256,1), The US Department of Labor's Fair Labor Standards Act (FLSA)

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