



The Fair Labor Standards Act: Five Pitfalls to Avoid

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The Department of Labor (“DOL”) Wage and Hour Division is responsible for administering and enforcing some of our nation’s most comprehensive labor laws, including the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”). For the year 2015, the DOL intends to use directed investigations (those which are not the result of a complaint) to increase its presence. These investigations can result in payment of back wages and penalties, and ultimately, oversights can be much costlier than paying workers the wages they were owed for their time and attendance in the first place. (The DOL recovered over \$249,954,412 in back wages in the year 2013 alone.) Here are some potential mistakes to avoid:

1. Assuming a Salaried Employee Is Exempt. There are specific FLSA exemptions from overtime and/or minimum wage requirements. However, merely placing an employee on salary does not change that employee’s position to exempt. The most commonly misapplied exemptions are the so-called “white collar” exemptions, which exempt certain executives, administrators, and learned professionals. Your employee must meet certain specific job duties, salary basis, and salary level tests in order for these to apply, and each position must be independently examined to determine if it qualifies.
2. Failure to Include All Required Pay in the Overtime Rate. The FLSA requires that overtime pay be determined using the employee’s “regular rate” of pay, which includes all earnings paid to the employee during the workweek. Non-discretionary or performance bonuses (those promised or expected based on an employee meeting certain performance requirements) must be included in calculating the regular rate. In addition, employers must pay overtime on commissions earned by non-exempt employees. Finally, the DOL has begun scrutinizing employers’ payment of per diem in certain instances for failure to include the payment in calculating the regular rate.
3. Not Tracking Hours Actually Worked. While the FLSA does not require any particular timekeeping device be used to record work hours, it does require that accurate records be kept of the number of hours worked by non-exempt employees. Time records must reflect hours actually worked, not just the employees’ work schedules. For instance, while bona fide meal periods (30 minutes or more) need not be compensated as work time, the employee must be completely relieved from duty for the purpose

of eating regular meals for the time to be non-compensable. Lunches that are interrupted for work or not taken at all must be paid. Lunch taken while working will not be considered a break from work. In addition, breaks of 20 minutes or less must be counted as hours worked.

4. Making Illegal Deductions. While certain deductions from an employee's pay may be allowed, federal law does not permit deductions for the benefit of an employer (uniforms, tools, etc.) which take an employee below the minimum wage per hour or that cut into overtime compensation required by the FLSA. This is the case even if the deduction is made to compensate an economic loss suffered by the employer as a direct result of the employee's negligence.
5. Misclassifying Independent Contractors. For the year 2015, the DOL has identified certain high risk industries on which to focus, including those which utilize subcontractors, independent contractors, and other contingent workforce. Accordingly, it requested \$3.8 million and 35 full-time investigators to increase enforcement related to misclassified workers. Merely entering an independent contractor agreement with an employee does not absolve an employer from liability if it is later determined the employee was misclassified and should, in fact, have been covered by the FLSA's protections. Courts often apply an economic realities test which considers non-exclusive factors, including the degree of control exercised by the employer, to determine the true classification of a worker as an employee or independent contractor.

Because the FLSA contains a liquidated damages provision which may allow plaintiffs to recover twice their actual back wages and attorneys' fees, even minor violations can be expensive. Further, if a violative pay practice is systemic, a plaintiff can file an FLSA collective action which allows individuals to opt in, permitting the aggregation of hundreds or thousands of claims with limited additional burden to plaintiffs. The bottom line is that compliance with FLSA must be taken seriously.

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