

10 Common FLSA Mistakes Employers Make Regarding Nonexempt Employees That Could End Up Costing You A Lot Of Money

The revisions to the Fair Labor Standards Act (FLSA) "white collar" exemption regulations, which took effect on August 2004, have attracted enormous attention over the past few months. While it's important to ensure that those changes are properly implemented in your workplace, don't forget about the rules surrounding your nonexempt employees.

The Department of Labor has been "extra busy" the last few years. In fiscal year 2003, it collected over \$212 million in back wages, up 21% over 2002. The rising tide of the potentially devastating FLSA collective (class) action suits also continues, rising from 71 cases in 2000, to 91 in 2002, and to 121 in 2003. No organization is immune.

Now may be a good time to not only audit your exempt positions, but also to review issues that affect nonexempt employees such as calculating "hours worked" and overtime, timekeeping and pay procedures. Wage and hour audits should be conducted annually (or at least biannually) as it's very easy for an organization to "slip" out of compliance. Remember that state law may also impose additional requirements. Contact your attorney or the DOL for specific information regarding your situation.

Be aware of these common violations:

1. Not paying an employee for unauthorized overtime.

Management has a duty to ensure that work is not performed if it doesn't want it be performed. Therefore an employee must be paid for overtime worked even if it wasn't authorized and the company had a policy prohibiting it. The situation should be handled through disciplinary action, not failure to pay the employee.

2. Failing to pay for time spent changing into uniforms or preparing to work.

Preliminary and post work activities are compensable if they are closely related and integral to an employee's main duties. Time spent putting on safety equipment or clothing may be compensable, walking from the front door to the timeclock may not be.

3. Not paying an employee who begins work "early," works beyond the normal closing time, or "voluntarily" works.

Employees can't "volunteer" to work extra time. They must be paid for all hours worked, even if a policy prohibits it.

4. Failing to provide a duty free lunch or allowing an employee to "work through lunch."

Under the FLSA, for a lunch period to be unpaid, an employee must be completely relieved of duty, generally for at least 30 minutes. Interruptions of even a few minutes may require that the lunch period be paid. Make sure that your meal deductions accurately reflect the employee's schedule.

5. Providing “comp” time instead of overtime.

Private employers may not give employees compensatory timeoff instead of overtime payments. Compensatory time may only be given within a workweek (e.g., an employee who has worked 40 hours by Thursday could be given Friday off.)

6. Failing to include bonuses in overtime.

Most bonuses, commissions, incentives, and shift differentials must be included when calculating overtime payments. A few discretionary payments, such as small Christmas bonuses may be excluded from the employee’s regular pay rate and may not affect overtime calculations.

7. Not paying for travel time.

Normal home to work time is not compensable but employees generally must be paid for travel time to a special site (beyond the normal commute), travel from job site to job site, and overnight travel away from home that cuts across a typical workday. Travel time on nonworking days (e.g., Sunday) is compensable if done during normal working hours. Travel during nonwork hours is not “hours worked” unless the employee is working during that time (e.g., doing paperwork, or driving the car).

8. Not paying for training or meetings.

Generally meetings and training must be counted as hours worked. However, such time is not compensable if: attendance is outside the employee’s regular working hours, attendance is really voluntary, the course or meeting is not directly related to the employee’s job, and the employee does not perform any productive work while attending. The time is not voluntary if an employee thinks that failure to attend could impact his job or working conditions.

9. Failing to pay for compensable waiting time.

In general, employees must be paid where waiting is an integral part of the job. Generally such times are short, unexpected, and the employee can’t use the time for her own purposes. (e.g., waiting for equipment to be fixed, supplies to be delivered, an assignment to be given, or a customer to walk through the door). Employees who are “on call” may have to be compensated, even if they are away from the workplace, if they really can’t effectively use the time for their own purposes.

10. Improperly (or sloppily) recording hours worked.

Timeclocks aren’t required, however employers should ensure that a reliable, consistent method is used to record hours worked. Rounding of time to the nearest 5, 10, or even 15 minutes may be acceptable if it can be shown that the employee is not harmed by the practice. In some instances the employee benefits, in others the company does.