

The Top 10 FLSA Mistakes

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Fair Labor Standards Act

- Minimum wage
 - Federal law: \$7.25/hr
 - State law varies
 - California: \$8.00/hr
- Overtime for non-exempt employees
 - Time and a half for all hours over 40 in a week
 - Calculated based on employee's "regular rate"
 - Public employers may offer comp time up to maximum accrual of 280 hours

The FLSA Does *Not* Require . . .

- Vacation, holiday, severance, or sick pay
- Holidays off or vacations
- Meal or rest periods
- Premium pay for weekends or holidays
- Pay raises or fringe benefits

Top 10 FLSA Mistakes

1. Miscalculating the “regular rate”
2. Treating all salaried employees as exempt
3. Making improper salary deductions
4. Misclassifying administrative employees
5. Misclassifying supervisory employees
6. Not paying for all compensable time
7. Misapplying the tip credit
8. Falling into the retaliation trap
9. Mishandling DOL audits or investigations
10. Sloppy or no record keeping

1. Miscalculating the Regular Rate

- Cannot be declared by parties; must be calculated
- Includes all forms of compensation
 - Commissions
 - Nondiscretionary bonuses
 - Noncash benefits (e.g., car)
- Does not include:
 - Sums paid as gifts
 - Discretionary bonuses
 - Reimbursable expenses
 - Sick leave, holiday, or vacation pay
 - Retirement contributions
 - Premiums paid for weekends or holidays

2. Treating All Salaried Employees As Exempt

- Exemption is determined by combination of salary *and* exempt duties
- Nonexempt employees can be paid a salary
 - Fluctuating workweek method
 - Must be clear agreement between parties
 - Pay overtime for hours over 40 in a week
 - Overtime rate computed by dividing weekly salary by total number of hours worked that week
 - Pay half time for overtime hours

3. Making Improper Salary Deductions

- Salary basis
 - Received fixed amount each pay period
 - Not subject to reduction for quality or quantity of work performed
- Cannot make deductions for:
 - Jury duty, witness, etc. (but can offset)
 - Absences caused by operating requirements of business or lack of work

Salary Deductions cont...

- Permissible deductions
 - Weeks where no work is performed
 - Full day absences for personal reasons
 - Full day absences for sickness or disability, if compensated for time under an employer plan
 - Penalties for infraction of major safety rules
 - Disciplinary suspensions for violation of work rules
 - Initial or terminal week of employment
 - Weeks of FMLA leave

Salary Deductions cont...

- Exemption lost if “actual practice”
 - Number of deductions
 - Time period
 - Number and location of those responsible
 - Employer policy prohibiting improper deductions
- Lost for all employees in same job classification under same managers responsible for impermissible deductions during periods where deductions occurred

Salary Deductions cont...

- Will not lose exemption for isolated or inadvertent improper deductions if employer meets safe harbor requirement:
 - Clearly communicated policy that prohibits improper deductions to salary
 - Policy has a complaint procedure
 - Employer reimburses employees for improper deductions

4. Misclassifying Administrative Employees

- Elements for exemption
 - Salary basis of \$455 per week
 - Primary duty is office or non-manual work directly related to management or general operations
 - Primary duty includes exercise of discretion and independent judgment for matters of significance
- Related to management or operations
 - Assist in running or servicing business
 - Not working toward employer's end product

Administrative Employees cont...

- Discretion and independent judgment
 - Comparing and evaluating possible courses of conduct, and acting or making a decision
 - Factors considered
 - Ability to waive or deviate from policies
 - Carries out “major assignments”
 - Work affects business to a “substantial degree”
 - Ability to commit employer to matters with “significant financial impact”
 - Providing advice to management
 - Investigates or handles complaints

5. Misclassifying “Supervisors”

- Elements to exemption
 - Salary basis of \$455 per week
 - Primary duty is *management* of business or division
 - Customarily and regularly directs work of two or more employees
 - Has authority to hire or hire employees, or recommendations are given “particular weight”

Supervisors cont...

- Primary Duty of Management
 - Selecting and training employees
 - Setting rates of pay and hours of work
 - Directing work of employees
 - Evaluating employee performance
 - Planning work, determining methods used
 - Controlling flow and distribution of materials
 - Planning and controlling budget

Supervisors cont...

- “Working Supervisors” Not Exempt
 - Some supervisory authority
 - Perform work unrelated to supervision
 - Primary duty is work performed by subordinates
 - Examples
 - Manager may help customers, serve food, clean, etc. so long as *primary duty* is management
 - Generally will never apply to blue collar workers (maintenance, construction, mechanics, plumbers, etc.)

6. Not Paying For Compensable Time

- Breaks
 - FLSA does not require breaks
 - But short breaks (5-20 mins) must be paid
 - Bona fide meal periods of 30 mins or more not compensable
- Waiting or on call time
 - Engaged to be waiting or waiting to be engaged
 - Donning or doffing clothing or equipment
 - Walking to and from changing area to job site

Compensable Time cont...

- Ordinary home to work travel not paid unless:
 - Emergency call outside normal work hours
 - Random commute to job site substantially further away than normal
- Job site to job site travel during day is paid
- Special one day assignment in another city
 - All time is compensable
 - Deductions allowed for meals and home-to-work equivalent
- Overnight travel out of town
 - Compensable when cuts across normal work day
 - Time spent as a passenger outside normal hours not compensable

7. Misapplying the Tip Credit

- Tipped employee: works in occupation where he customarily and regularly receives more than \$30 a month in tips
- Employer may consider tips as part of wages, but must pay at least \$2.13 per hour in direct wages and must inform employee in advance
- If tips plus direct wages do not equal minimum wage, employer must make up the difference

8. Falling into the Retaliation Trap

- Protected activity
 - Complaints
 - Proceedings
 - Testimony
 - Service on industry committee
- Prohibited conduct
 - Discharge
 - Discrimination in any manner

Retaliation cont...

- Preventing retaliation claims
 - Understand statutory protections
 - Know that post-employment conduct counts
 - Notify employees that you prohibit retaliation
 - Train supervisors
 - Contain anger and “get even” mentality
 - Emails and text messages are dangerous
 - Discipline when necessary
 - Respond promptly and fairly to complaints
 - Have a policy and apply it consistently

9. Mishandling DOL Audit/Investigation

- Conduct own investigation promptly
 - May preclude on-site visit
 - Use experienced personnel
- Identify relevant documents and preserve them
 - Explain files or documents at time of review
 - Correct any paperwork as needed
 - Don't limit response to documents requested by DOL
- Seek early settlement if claim appears meritorious
- Try to avoid expansion of investigation

10. Sloppy or No Recordkeeping

- Do not have to be kept in any particular form
- Time clocks are not required
- Failure to maintain records is violation of FLSA
- Poor records make responding to DOL inquiry or defending a lawsuit very difficult

Recordkeeping cont...

- Following records must be kept:
 - Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years old
 - Hour and day when workweek begins
 - Total hours worked each workday and each workweek
 - Total daily or weekly straight-time earnings
 - Regular hourly pay rate for any week when overtime is worked
 - Total overtime pay for the workweek
 - Deductions from or additions to wages
 - Total wages paid each pay period
 - Date of payment and pay period covered

Thank you for attending!

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