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# Wage and Hour Law: How to Save on Overtime Wages, Penalties and Legal Fees

Presented by Max Muller

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# Fair Labor Standards Act ("FLSA")

## Minimum Wage

Both the FLSA and state wage and hour laws establish a minimum wage which must be paid to non-exempt employees for each hour worked. Whichever law provides for a higher wage governs. There is no maximum wage.

The minimum wage is the gross hourly wages paid, i.e., the wage prior to any deductions.

## Tipped Employees

### *Characteristics*

Tipped employees are those who customarily and regularly receive more than \$30 a month in tips. Tips actually received by tipped employees may be counted as wages for purposes of the FLSA, but the employer must pay not less than \$2.13 an hour in direct wages.

### *Requirements*

If an employer elects to use the tip credit provision the employer must:

- 1) Inform each tipped employee about the tip credit allowance (including amount to be credited) before the credit is utilized.
- 2) Be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined.
- 3) Allow the tipped employee to retain all tips, whether or not the employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement.

If an employee's tips combined with the employer's direct wages of at least \$2.13 an hour do not equal the minimum hourly wage of \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009; the employer must make up the difference.

### *Youth Minimum Wage*

The 1996 Amendments to the FLSA allow employers to pay a youth minimum wage of not less than \$4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment by their employer. The law contains certain protections for employees that prohibit employers from displacing any employee in order to hire someone at the youth minimum wage.

### *Dual Jobs*

When an employee is employed concurrently in both a tipped and a non-tipped occupation, the tip credit is available only for the hours spent in the tipped occupation.

### *Retention of Tips*

The law forbids any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. A tip is the sole property of the tipped employee. Where an employer does not strictly observe the tip credit provisions of the Act, no tip credit may be claimed and the employees are entitled to receive the full cash minimum wage, in addition to retaining tips they may\should have received.

### *Service Charges*

A compulsory charge for service, for example, 15 percent of the bill, is not a tip. Such charges are part of the employer's gross receipts. Where service charges are imposed and the employee receives no tips, the employer must pay the entire minimum wage and overtime required by the Act.

### *Tip Pooling*

The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), busboys/girls and service bartenders..

### *Credit Cards*

Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, then the employer may pay the employee the tip, less that percentage.

## **Overtime**

### *Workweek defined*

A workweek is comprised of a fixed and regularly recurring period of 168 hours, or seven consecutive 24 hour periods. The workweek can begin any hour of the day and day of the week. The beginning of the workweek may be changed only if the change is intended to be permanent and not to circumvent the law.

Each workweek stands alone.

### *Overtime rate*

Employees must be paid at the rate of time and one-half their regular hourly rate for compensable hours over forty during a workweek.

## **Compensable Hours**

Compensable work time is time spent by a worker for the benefit of the employer, with the employer's actual or constructive knowledge, performing the worker's "principle" activity or functions integral to his or her principle activity.

## *Employees "Suffered Or Permitted" To Work*

- Employees must be paid for all work "suffered" – the employer made them do it.
- Employees must be paid for all work "permitted" – the employer let them do it.

According to Department of Labor regulations, if an employer does not want work performed by an employee,

it is the duty of management to exercise its control and see to it that the work is not performed .... It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

☞ Although you may not authorize it, if you allow an employee to work through lunch, even if they clock out, you must pay them for the time worked!

## **Early clock-in -- De Minimis Rule**

- 29 CFR 785.47

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

- Recommendation – do not allow early clock-in or clock-out of any greater time frame than 7 to 10 minutes. Round up or back accordingly.

## **Waiting Time**

Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time)

## **On-Call Time**

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom, e.g., less than 30 minutes of free time, could require this time to be compensated.

## Rest and Meal Periods

- Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.
- Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

## Sleeping Time and Certain Other Activities

- An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy.
- An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

## Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

## Travel Time

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

- *Home To Work Travel:* An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.
- *Home to Work on a Special One Day Assignment in Another City:* An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.
- *Travel That is All in the Day's Work:* Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

- *Travel Away from Home Community:* Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

## **Exemptions From Overtime**

To be exempt an employee must

- (a) be paid at least \$23,600 per year (\$455 per week),
- (b) be paid on a salary basis, and
- (c) perform exempt job duties.

Most employees must meet all three "tests" to be exempt.

### **Salary level test.**

Employees who are paid less than \$23,600 per year (\$455 per week) are nonexempt. (Employees who earn more than \$100,000 per year are almost certainly exempt.)

### **Salary basis test.**

Generally, an employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving for any work week in which s/he performs "any" work.

The FLSA salary basis test applies only to reductions in monetary amounts. Requiring an employee to charge absences from work to leave accruals is not a reduction in "pay," because the monetary amount of the employee's paycheck remains the same. Similarly, paying an employee more than the guaranteed salary amount is not normally inconsistent with salary basis status, because this does not result in any reduction in the base pay.

### **The duties tests.**

An employee who meets the salary level tests and also the salary basis tests is exempt only if s/he also performs exempt job duties. There are three typical categories of exempt job duties, called "executive," "professional," and "administrative."

#### *Exempt executive job duties*

Job duties are exempt executive job duties if the employee

1. regularly supervises two or more other employees, and also
2. has management as the primary duty of the position, and also,
3. has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

#### *Exempt professional job duties.*

Professionally exempt work means work which is predominantly intellectual, requires specialized education, and involves the exercise of discretion and judgment. Professionally exempt workers must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades. Advanced degrees are the most common measure of this, but are not absolutely necessary if an employee has attained a similar level of advanced education through other means (and perform essentially the same kind of work as similar employees who do have advanced degrees).

***Exempt Administrative job duties.***

The most elusive and imprecise of the definitions of exempt job duties is for exempt "administrative" job duties.

The Regulatory definition provides that exempt administrative job duties are

- (a) office or nonmanual work, which is
- (b) directly related to management or general business operations of the employer or the employer's customers, and
- (c) a primary component of which involves the exercise of independent judgment and discretion about
- (d) matters of significance.

The administrative exemption is designed for relatively high-level employees whose main job is to "keep the business running." A useful rule of thumb is to distinguish administrative employees from "operational" or "production" employees. Employees who make what the business sells are not administrative employees. Administrative employees provide "support" to the operational or production employees. They are "staff" rather than "line" employees.

A photograph of a man in profile, looking towards the right, with a red tint over the entire image. In the background, a sign reads "CARWASH EXIT".

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