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## Seven Deadly Wage and Hour Sins For Employers

By Ronald S. Stadler

The wave of wage and hour cases being filed by employees has not slowed, and we continue to see well-intended employers facing back wages, penalties, interest and attorneys' fees because of wage and hour violations under the Fair Labor Standards Act ("FLSA"). In short, the FLSA requires that non-exempt employees to be paid at least the minimum wage for all hours worked and overtime pay at 1 ½ times the regular rate of pay for all hours worked in excess of 40 hours in a workweek. While seemingly simple, compliance with these obligations remains nuanced and can subject an employer to liability.

In 2010, the Department of Labor ("DOL") launched a "We can help" campaign encouraging employees to contact DOL if they believe they are being paid incorrectly. DOL hired celebrities to help convey its message and commercials began appearing on local television as well as in movie theaters. The DOL also hired more investigators to enforce FLSA requirements, which has resulted in wage and hour audits being on the rise. Employees' attorneys also actively seek out potential class action claims.

Wage and hour auditors normally inspect employer payroll records for FLSA compliance for the previous two years, reviewing both current and former employees. If an employer has willfully violated the FLSA, 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 double damages. The DOL can also prosecute violations criminally

with fines of up to \$10,000. Civil money penalties of up to \$1,100 per violation are also possible for willful and repeated violations.

Employers often find it easy to comply with the FLSA's minimum wage requirements. The typical FLSA mistakes that we often see employers make are much more complex, often involving overtime issues, misclassification of employees and not paying for off the clock work. The following are the seven common mistakes that employers make:

### **1. Not paying overtime for non-exempt employees**

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 an employee agrees to be paid straight time for hours worked in excess of 40 hours per week, that there is no violation. However, employee waivers are not enforceable and if an employee works in excess of 40 hours per week, he is entitled to overtime. The DOL will enforce that on behalf of the employee.

### **2. Misclassifying of non-exempt employees as exempt**

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. Even then, the tests are not easy to perform as they are filled with discretion, and are complex, detailed and particular.

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 that the 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.

Classifying a position as exempt or non-exempt can be complex

and challenging. It needs to be based on actual job duties, and as some job duties can change with time, employers should be diligent in re-evaluating positions that could change from exempt to non-exempt. If there is any question as to the classification of a position it is best to confer with legal counsel.

### **3. Not paying overtime for piece rate or piecework**

Employers must also pay overtime for piece rate or piecework if an employee works more than 40 hours within a work week. A "piece rate" is where the employee is paid a fixed amount of money for a given piece of work. The employee is entitled to one-half of the regular rate for each hour worked above 40 hour per work week, 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. Thus, if the employee has worked 46 hours and has earned \$390.00 at piece rates for 46 hours of productive work, the total compensation of \$390.00 must be divided by the total hours of work, 46, to arrive at the regular hourly rate of pay -- \$8.48. For the 6 hours of overtime the employee is entitled to additional compensation of \$76.32 (6 hours at \$12.72). For the week's work the employee is entitled to a total of \$415.52 (40 hours at \$8.48 plus 6 overtime hours at \$12.72).

### **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 (e.g. a set amount per week). 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 she is still paid overtime for any hours worked in excess of 40 hours per work week.

### **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, if the employer 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 may be responsible for compensating the employee. 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, can be considered hours worked and may be compensable time.

## **6. Unpaid breaks and waiting time**

The FLSA requires that any break under 20 minutes 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 occasionally 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. Requiring employees to stay at their desk or on the shop floor during such a period, however, could make the time compensable.

## **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 require that timesheets for non-exempt employees 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. Those records must also be preserved. The FLSA requires "Records on which wage computations are based should be retained for two years." 29 CFR §516.6. This includes time cards, piece work tickets, wage rate tables, and work and time schedules, and records of additions to or deductions from wages." Payroll records must be maintained for three years. 29 CFR §516.5.

## **Summary**

We recommend to every employer that it complete an internal audit every few years to determine if it is in compliance with the FLSA. We often help employers identify and correct mistakes before they become big issues that incur big fines, penalties and costs. Also, 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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