

## **(3) FAQs Common Questions and Answers About Your Right to Wages**

### **1. What is the Governing Law?**

The federal law governing the payment of wages to employees is called the Fair Labor Standards Act ("FLSA"). The FLSA establishes the standards governing employees' rights to minimum wage and overtime compensation. Simply put, the FLSA states that most employees are required to be paid time and one-half their regular hourly rate for any hours worked over forty (40) in a workweek. Additionally, the FLSA generally requires that employees be paid a minimum of \$5.15 per hour for each hour worked in a workweek.

Louisiana law, specifically La.R.S. 23:631 and 23:632 require payment of final pay checks shortly after termination. They also provide for penalties and attorney fees when the requirements under those statutes are violated.

### **2. How Does Overtime Work?**

Generally, employees must be paid a time and one-half their hourly rate for any hour worked over forty (40) in a workweek. For example, if you make \$8.00 per hour, then you should be paid \$12.00 per hour for all hours you work over forty (40) in a work week. If you are paid a salary by another method or basis (day rate or piece rate), your overtime rate needs to be converted to an hourly rate using the methods set forth established by the Department of Labor ("DOL"). As these methods typically differ depending on a particular situation, consult with a wage and hour attorney to determine how to accurately calculate your overtime compensation.

### **3. What Is Considered "Work" Under the FLSA?**

Typically, work time under the FLSA includes all time spent performing job-related activities which: (1) benefit the employer; (2) the employer "knows or has reason to believe" are being performed by an employee; and (3) which the employer does not prohibit the employee from performing. This includes time spent doing "off the clock" work such as maintaining equipment before or after the work shift, staying late after work shifts without recording for overtime, doing job-related paperwork at home, making and responding to job-related telephone calls, and working through meal periods but having hours deducted from the employee's time sheet. Additionally, time spent traveling during the work day as well as "on call" or "waiting" time may likewise be compensable as hours worked. Therefore, even if an employer typically pays overtime, but does not compensate its employees for "off the clock" work or the other activities described above, the employee may be entitled to recover additional overtime compensation.

### **4. How Is a Workweek Defined Under the FLSA? - Can My Employer Average Two Weeks?**

Under the FLSA, a workweek is defined as any seven (7) day consecutive period. The starting and ending point for the workweek is defined by the employer. Overtime must be computed on a week by week basis. Each workweek stands alone under the FLSA, and working time cannot be averaged from week to week. Therefore, if an employee typically is paid every two weeks, he/she is entitled to be paid overtime compensation for each hour worked over forty (40) in each of the two weeks of the pay period. For example, if an employee worked 50 hours in week one, followed by 30 hours in week two, he/she is entitled to 10 hours of overtime pay for the first week, even though the average hours for the pay period totals forty (40) per week.

#### **5. Can My Employer Prevent Me from Working More Than Forty (40) Hours in a Workweek?**

Yes. An employer may adjust its employee's work shifts within a work week to avoid an employee working overtime. For example, if employees work "extra" time early in the workweek, the employer may send them home later in the same work week so that total hours actually worked in that work week will not exceed forty (40). Under this scenario, no overtime compensation would be due to the employee.

#### **6. Must Overtime Be Approved By the Employer To Be Compensable?**

Typically not. The law states that if an employer knew, or had reason to know that you were working overtime, you are likely entitled to recover such time. This is true even if your employer tells you not to work overtime but still is aware of the additional hours worked. And, while many employers tell employees that overtime will not be paid if not approved, the fact remains that if you work overtime and the employer knows about it or should know about it, they must pay you for it.

#### **7. Am I Required To Ask for, or Report Overtime To Be Paid for It?**

No. The employer is responsible for managing its workplace and hours worked, not the employee. Therefore, it is up to the employer to ensure that the employee is not working more hours than scheduled. Additionally, an employee's failure to ask for overtime after it has been worked generally is not a defense to a claim for overtime compensation. A narrow exception to this rule exists where the employer requires that all time be reported and enforces this policy through disciplinary measures if an employee fails to adhere to the policy.

#### **8. I'm Paid a Salary. Does This Mean I Am Not Entitled to Overtime?**

No. The most common mistake made by employers and employees alike is that simply paying an employee a salary makes the employee exempt from the overtime laws. THIS IS NOT TRUE. Being paid a salary is not the same as being an exempt employee. Generally, to be "exempt," an employee must be paid a salary and perform certain executive, administrative, or professional duties. These exemptions apply to "white collar" workers. Therefore, if you work with your hands or outside of an office type environment, these exemptions likely will not apply to your situation and you may be entitled to overtime.

Typically, to be an executive employee, an individual must be an employee who falls within the executive exemption and must regularly: (a) supervise two or more other employees; (b) manage an organization, department, or subdivision of the company; and (c) have the authority to hire and fire employees or make recommendations regarding these tasks that are given significant consideration in the ultimate decision making process. Executive employees typically are high ranking members of an organization/employer. However, the actual duties performed, not a fancy job title will control.

To be an administrative employee, an individual must: (a) perform "office" or non-manual work that is related to management of the company or the general business operations of the company; and (b) regularly exercise "independent discretion and judgment" with regard to matters of significance. Typically, employees who fall within the following categories are administratively exempt: insurance claims adjusters, human resource managers, computer/network administrators, financial services providers, and management consultants. On the other hand, clerks, examiners, graders, financial product salespersons, and processors are not administratively exempt.

To be a professional employee, an individual's job duties require the application of advanced, usually specialized, learning or credentials of the type commonly associated with the "traditional learned professions" such as medicine, law, accounting or engineering. Typically, but not necessarily, a professionally exempt employee will hold a specialized academic degree in the field, and professionally exempt job duties imply that the employee exercises a good deal of judgment and discretion in performing the work. The DOL specifically identifies the following categories of employees as falling within the professional exemption so long as licensing requirements of the profession are met: (a) registered or certified medical technologists; (b) registered nurses (RN); (c) dental hygienists; (d) physician assistants; (e) CPA's; (f) chefs; and (g) athletic trainers.

To the contrary, the DOL identifies the following categories of employees as NOT falling within the professional exemption: (a) cooks; (b) licensed practical nurses (LPN); (c) bookkeepers; (d) paralegals or legal assistants; and (e) trainees.

The bottom line is this - exemptions need to be examined on a case by case basis. There are other exemptions that apply to employees in particular industries (such as employees who work at auto dealerships, in agriculture, as taxi drivers, as commissioned sales employees, as computer professionals, and outside sales representatives) Therefore, if you are unsure whether your job duties or pay structure make you exempt, contact a qualified wage and hour attorney to discuss whether you may be entitled to overtime compensation.

## **9. Are Independent Contractors Entitled to Overtime?**

If an individual truly is an independent contractor, they are not entitled to overtime compensation for hours worked over forty (40) in a workweek. To determine whether an individual is an independent contractor, courts typically apply what is called the "economic

realities" test; this test analyzes the following factors: (a) the degree of control exercised by the alleged employer; (b) the extent of the relative investments of worker and alleged employer; (c) the degree to which the workers' opportunity for profit and loss is determined by the employer; (d) the skill and initiative required in performing the job; (e) permanency of the relationship; and (f) the extent to which the worker's services are integral to the entity. While no one factor is dispositive of the issue of whether an individual is an independent contractor or employee, courts typically conclude that if two (2) or more of the above factors cut against the existence of an employer-employee relationship, the individual will be considered an independent contractor and therefore, not entitled to overtime compensation.

#### **10. What Is the Standard for Determining Whether My Employer Should Have Known That I Was Working Overtime?**

Typically, an employer will be held to "know" what it "could have (or should have) found out" if it was paying attention to the hours its employees were working. The standard typically applied by the courts analyzes whether the employer could have learned of the employee's activities by making reasonably diligent inquiries. Frankly, it is very unusual for a court to find that an employer did not have the requisite knowledge when the activities in question are a vital or important part of an employee's job, unless the employee has deliberately hidden the fact that he/she is performing these duties and working those additional hours.

#### **11. Am I Required to Keep Records of the Additional Time I Worked?**

No. The burden is on the employer to maintain accurate time records of hours worked by its employees. Courts typically find that, where an employer failed to maintain accurate time records, the employee is entitled to recover what he/she determines is a reasonable and realistic estimation of hours worked. The burden is on the employer to show that the hours estimated by the employee are inaccurate. If the employer did not maintain accurate time records, however, the employer's burden to dispute the hours estimated by the employee is difficult. Remember, the employer, not the employee, has the burden of keeping accurate records of hours worked and amounts paid.

#### **12. Instead of Paying Me Overtime for Hours Worked Over Forty (40) in a Workweek, My Employer "Banks" the Time or Gives Me "Comp. Time" For Later Use. Can It Do That?**

Not unless you work for the government. This is a common violation by private employers of the FLSA. "Banked" or "Comp. Time" is not permissible in the private sector. The FLSA specifically requires that if employees work more than forty (40) hours in a workweek, they must be paid cash (or its equivalent). Therefore, if your employer is giving you "Banked" or "Comp. Time," when you work over forty (40) hours in a workweek, your employer is violating the FLSA.

#### **13. I Am Not a Legal Citizen of the United States. Am I Still Entitled to Recover Overtime?**

Yes. The law in Louisiana provides that even if an individual is not a citizen, he/she still is entitled to pursue a claim for unpaid overtime or minimum wage compensation under the FLSA.

**14. My Employer Only Pays Me in Cash. Am I Prevented From Pursuing a Claim for Overtime or Minimum Wage Compensation?**

No. employees paid solely in cash are still entitled to pursue claims for unpaid overtime and minimum wage compensation against their employer if the employer wrongfully failed to pay the employee time and one-half (overtime) for hours worked in excess of forty (40) in a workweek, or less than the current federal minimum wage of \$5.15 per hour.

**15. I Quit/Got Fired and Did Not Get Paid for My Final Weeks of Work. Can I Recover This Unpaid Compensation?**

Yes. This is an incredibly common violation of the FLSA's minimum wage requirements. The FLSA's current minimum wage is \$5.15 per hour. Therefore, if an employee worked any hours for his/her employer during those final weeks and did not receive any pay either due to resignation or termination, the employee's average hourly wage is \$0.00 per hour, well below the current minimum wage requirement. The employee could file an FLSA lawsuit solely to recover the unpaid minimum wages due. Louisiana law also provides remedies for not giving an employee his/her final pay.

**16. How Do I File an FLSA Lawsuit?**

You should hire an attorney if you wish to file an FLSA lawsuit. Because of the complex legal principles involved in analyzing FLSA claims, not all attorneys are familiar with this area of the law. Employees wishing to enforce their rights should find an attorney with significant FLSA experience. If you already have a lawyer and he or she is not familiar with this law, your attorney may choose to "affiliate" with a lawyer experienced in this area of the law. If you are interested in having us review your potential claim.

**17. If I file an FLSA lawsuit and win, what can I recover?**

If an employee prevails on his/her FLSA claim, he/she typically will be entitled to recover back pay for all unpaid overtime, usually beginning two years before the complaint is filed. In certain situations, the court will allow three (3) years of recovery. Additionally, in some instances, employees are entitled to recover double the amount of back pay or what is called "liquidated damages." Most importantly, the FLSA requires that the employer, not the employee, reimburse out of pocket litigation expenses and pay the employee's attorneys' fees.

**18. How Long Will the FLSA Lawsuit Take?**

There is no definitive answer to this question. Unfortunately, the legal process is typically slow. FLSA cases are filed in federal, not state court. Therefore, how fast a case can settle or get to trial on the merits will vary from judge to judge, and client to client. Many FLSA cases do settle before trial but again, it depends on the circumstances of each case.

#### **19. How Far Back Can I Go To Recover Unpaid Overtime Wages?**

The FLSA normally permits recovery for work performed beginning two (2) years from the date a complaint is filed in court. In certain instances, an additional year's recovery period is permitted if the employer "knew" that its pay policies and practices violated the FLSA, but "disregarded" these obligations. The only way to stop the clock from "ticking" on an employee's claims is to file a legal complaint in court. Simply complaining to the employer or calling the Department of Labor does not stop the clock.

#### **20. My Current Employer Is Not Paying Me Overtime. I Am Concerned That If I File an FLSA Lawsuit, I Will Get Fired. Am I Protected?**

Yes, you are protected. The FLSA specifically states that it is: "unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted any or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding." An employer who retaliates or discriminates against an employee in violation of this statute is subject to fines or even criminal prosecution, and the affected employee is entitled to "legal or equitable relief ... including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount" plus attorneys' fees and court costs. Punitive damages also are available in appropriate cases, and "anti-retaliation" cases may be brought against individuals as well as institutional employers. Retaliation can take on other forms other than firing. For example, courts typically find retaliation in the following circumstances: blacklisting employees who make FLSA claims, refusing to hire applicants who previously made FLSA claims, reducing job responsibilities or importance of position, assigning employees to difficult or "unpopular job duties or shifts," disciplining employees disproportionately, providing unusually poor performance evaluations, or declining typical raises.

#### **21. I Signed a Waiver Stating That I Would Not Pursue a Claim for Overtime Compensation. Can I Still Pursue a Claim?**

Yes. Employers generally may not ask their employees to sign away their rights to minimum wages and overtime pay, even in the context of a waiver. Only waivers supervised by the DOL or obtained in a private lawsuit can eliminate your rights.

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