

(4) 10 Common Overtime Mistakes

What are the most common mistakes made by employers that deprive employees of overtime compensation?

1) Assuming That an Employee's Fancy Job Title Makes Them Exempt

Remember, the courts will focus on the job duties performed by the employee to determine whether he or she is exempt. It does not matter if the employer labels the employee a manager when, in reality, the employee does nothing different than the employees he or she is supposed to be "supervising."

2) Assuming That Because an Employee is Salaried, He or She Is Exempt

This is the biggest misconception out there regarding overtime. Remember, an employee must be paid a salary AND meet the duties test for a particular exemption to be considered exempt. For example, if a person is a dishwasher, a cook, a landscaper, or clerical worker, they are likely not exempt regardless of how much of a salary they receive.

3) Straight Misclassification of Employees

Even when employers understand the law regarding exemptions, they still may misclassify an employee as exempt and wrongfully withhold overtime pay due to that employee. Even worse, some employers know that the employee should receive overtime but make the decision to classify the employee as exempt because: (a) the employee may never find out; and/or (b) the cost of having to pay unpaid overtime wages and attorneys' fees and costs, if discovered by the employee, is cheaper than doing it the right way. Being misclassified and not getting paid overtime in accordance with the law can result in thousands of dollars of lost unpaid overtime.

4) Making Employees Work Off the Clock

Employers may tell workers to clock out and finish their work; additionally, employers may have employees work before their shift begins or attend a pre-shift meeting. Employers regularly fail to consider this additional time worked by their employees as "hours worked." This practice results in employees receiving less overtime pay than they otherwise are entitled to receive.

5) Refusing To Pay Overtime That Was Not Pre-approved

Remember, if the employer knows or has reason to know that an employee is working overtime, the overtime must be paid whether the employer approves it. The employer is not allowed to get the benefit of the employee's work without paying for it.

6) Assuming That If an Employee Quits or Gets Fired, the Employee Is Not Entitled To Receive His or Her Final Paycheck

Under the FLSA, an employee is entitled to earn a minimum of \$5.15 per hour for every hour worked. If the employee quits or gets fired, and does not receive his or her final paycheck for the hours worked in his or her last pay period, the employee earns the equivalent of \$0.00 per hour - well below the minimum wage. Therefore, if an employee is not paid his or her final paycheck, he or she can pursue those wages under the FLSA.

7) Paying an Employee "Straight Time" Rates for Overtime Work

The FLSA requires that overtime be paid and time and one-half, not straight time. Therefore, if an employee makes \$8.00 per hour, he or she should get paid \$12 per hour for hours worked over forty (40) in a workweek. Many employers simply continue to pay a straight time rate (\$8.00 in the example) for any hours over forty (40) worked by their employees in a workweek. The result of this practice is that the employee does not receive the "half" of the time and one-half rate of pay required for overtime work. The value of this "half" time adds up quickly.

8) Automatic Lunch, Break, and Other Deductions

It is much easier for the employer when it does not have to keep accurate records of its employees' start, stop, and break times. To facilitate this process, employers frequently make automatic punch and lunch deductions to employees' time cards, regardless of whether the employee worked early, stayed late, or worked through lunch. These automatic deductions result in hundreds of unpaid hours per employee each year. Employers cannot avoid their obligation to keep accurate time and pay records at the expense of the employee.

9) Compensatory Time is Not Allowed In the Private Sector

Employers regularly tell employees that they can get compensatory time off ("Comp. Time") at some later point if they work more than forty (40) hours in a workweek. For example, an employee works fifty-five (55) hours in a workweek and is told that he or she can have time off in some other week to offset the extra fifteen (15) hours instead of being paid overtime that is due. Employees who are subjected to this "comp. time" practice typically have a claim for unpaid overtime. This is because employees are supposed to be paid overtime for any hours worked over forty (40) in each workweek. Employees subjected to this practice of "banking" hours typically lose thousands of dollars per year. What is most troubling, however, is that most employers do not even keep track of the "banked" hours and typically do not repay the "comp time" because the business operations are always "too busy." Even worse, employees who are fired or quit do not receive payment for the "banked" time when they leave.

10) Failing To Include Other Payments To the Employee in Calculating the Rate of Overtime Owed

Employers who pay overtime frequently do so incorrectly. For example, employers fail to include productivity bonuses or shift premium payments in calculating the appropriate time and one-half wage. For example, if you make \$8.00 per hour and get a \$100 productivity bonus

per week, your compensation must include the additional productivity bonus in calculating overtime due. As a result, an employee's overtime rate will be higher. Employees that do not get the benefit of having these additional bonuses included in their overtime pay are regularly owed additional wages. Assuming an individual is an independent contractor, not an employee

The FLSA's overtime and minimum wage provisions only apply to "employees," not "independent contractors." Therefore, employers often attempt to avoid the payment of wages by classifying their workers as "independent contractors." When courts look at whether or not a person is an independent contractor or an employee, they analyze the "economic realities" of the relationship. What this means, is that the courts analyze the true nature of the relationship based on the actual facts and not based on what the parties label the relationship. The factors typically considered include:

1. The degree of control exercised by the alleged employer;
2. The extent of the relative investments of worker and alleged employer;
3. The degree to which the workers' opportunity for profit and loss is determined by the employer;
4. The skill and initiative required in performing the job;
5. The permanency of the relationship; and
6. The extent to which the worker's services are integral to the entity.

If one or more of these factors is resolved in favor of finding an employer-employee relationship, the individual misclassified as an "independent contractor" likely is entitled to all overtime and minimum wages not paid. This can result in a significant payment of back wages not only to the individual, but to other individuals classified the same way by the employer.
