

# *Legal Update*

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## **FIVE COMMON MISTAKES EMPLOYERS MAKE WITH REGARD TO THE FAIR LABOR STANDARDS ACT**

By Jon Vegosen

The Fair Labor Standards Act (FLSA) provides that most employees must be paid (a) overtime pay at one and one-half times their regular rate of pay after 40 hours in a workweek if they are non-exempt and (b) at least the federal minimum wage. While the FLSA may seem simple on its face, employers regularly make mistakes in following the law. Indeed, employers often make at least one of five common mistakes in connection with the FLSA. In light of the increased enforcement of the wage-and-hour laws, these mistakes can prove costly to employers.

### **Misclassifying Employees:**

The FLSA requires every employer to classify each of its employees as “exempt” or “non-exempt.” The main difference between these classifications is that non-exempt employees must be paid overtime. Many employers mistakenly assume that simply because an employee is paid a salary (as opposed to an hourly wage), or has a high-ranking job title, the employee will be considered exempt from overtime pay. Neither salary nor job titles, however, determine the exempt status of an employee. Rather, to qualify for the exemption, an employee’s duties and responsibilities, in addition to specific salary requirements, must meet certain tests. For example, some employers pay their executive assistants substantial salaries in recognition of their talents, company knowledge, work ethic, and loyalty. They fail, however, to pay those assistants for hours they work in excess of 40 in a workweek. When confronted with this failure, executives often say something like, “But I’m paying him so well. He makes \$60,000 a year.” This is a misguided response. The reality is that the assistant’s duties generally do not fall within one of the available exemptions.

### **Averaging Pay:**

Another common mistake some employers make is that they “average” an employee’s hourly pay in an effort to equalize compensation without accounting for overtime pay. For example, suppose an employer pays its employees on a weekly basis. In week one, a non-exempt employee works 50 hours, and in week two, she works only 30 hours. Some employers believe that the employee should be paid 80 hours of straight time pay – or the average (40 hours) of the two weeks of pay. The employee, however, is entitled to 40 hours of straight time pay and ten hours of overtime pay for week one, and 30 hours of straight time pay for week two.

### **Miscalculating Overtime Pay:**

The FLSA requires employers to pay non-exempt employees overtime at one and one-half times their “regular” rate of pay. Some employers, however, believe the term “regular rate” means an employee’s hourly rate, and they do not include items such as attendance bonuses and “lead” premiums in their

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calculations. By making this mistake, employers fail to properly determine an employee's overtime pay. For example, suppose an hourly employee making \$12.00 an hour is provided with a \$5.00 per week attendance bonus for perfect attendance and a 50 cent per hour straight time premium for being a "lead person" when his supervisor is not at work. If the employee works 50 hours in a seven-day workweek, has perfect attendance, and serves in a lead role in a given week, an employer might pay the employee \$660 (\$480 for 40 hours + \$180 for 10 hours of overtime). The employer, however, should be factoring in the bonus and the lead premium into the employee's regular rate of pay. The proper amount of total pay for the week is \$694.50, calculated as follows:

<b>Hourly rate:</b>	\$12 hr.
<b>Regular rate:</b>	\$12.63, calculated as follows: \$480 (\$12 X 40 hours) + \$5 attendance bonus + \$20 lead bonus (\$.50 X 40 hours) \$480 + \$5 + \$20 = \$505. \$505 / 40 hours = \$12.63
<b>Overtime rate:</b>	\$18.95 hr. (\$12.63 X 1.5)
<b>Overtime pay:</b>	\$189.50 (\$18 X 10 hours)
<b>Total pay:</b>	\$694.50 (\$505 + \$189.50)

#### **Ignoring State Minimum Wage Laws:**

One of the most common mistakes employers make with regard to the FLSA is to ignore state minimum wage laws. Employers must not only follow the federal laws, but also must follow the laws of the states in which they do business. When there is any conflict between federal and state wage laws, employers should generally follow the law that is more favorable to employees. For example, the current federal minimum wage is \$7.25 per hour, and the Illinois minimum wage is \$8.25 per hour. Accordingly, employers in Illinois must pay their non-exempt employees subject to minimum wage at least \$8.25 per hour; paying them only \$7.25 per hour violates state law. The U.S. Department of Labor has a webpage that provides the minimum wage, if any, for each of the 50 states as well as Puerto Rico, Guam, American Samoa, and the US Virgin Islands: <http://www.dol.gov/whd/minwage/america.htm>.

#### **Failure to Maintain Adequate Records:**

Employers often fail to maintain appropriate records. This can present both legal compliance and practical problems for employers. The FLSA requires employers to maintain extensive records regarding non-exempt employees, including, but not limited to, the following: (1) names, addresses, and social security numbers; (2) birth dates of employees younger than 19; (3) time and day of week when the employee's workweek begins; (4) daily hours worked; (5) total hours worked each workweek; (6) basis on which employees' wages are paid; (7) regular hourly pay rate; (8) total daily or weekly straight-time earnings; (9) total overtime earnings for the workweek; (10) all additions to or deductions from wages; (11) total wages paid each pay period; and (12) date of each payment and the period covered by such payment. Employers are required to preserve payroll records for at least three years. Moreover, records on which wage computations are based (*e.g.*, time cards) must be preserved for two years and be available for inspection by the Department of Labor. In addition to potential administrative actions, employers who fail to maintain the appropriate records risk a "he said, she said" scenario in the event that an employee sues the employer claiming FLSA violations. Moreover, to avoid penalizing employees for their



employer's inadequate record-keeping, courts require employers who fail to keep adequate records to bear the burden of disproving reasonable inferences that may be drawn in favor of employees regarding their hours worked and compensation owed them.

Illinois employers should also take heed that, unlike Federal law, Illinois law requires employers to maintain wage and hour records for all employees -- both non-exempt and exempt (whereas Federal law requires such records for non-exempt only). Moreover, an employer's failure to maintain records can be used against the employer in a wage dispute. For example, if an employee contested her exempt status and was found to be non-exempt, and if the employer did not have records of her hours worked, the employer would likely be unable to rebut the employee's testimony regarding her hours worked -- which could mean back pay for overtime and significant penalties for the employer.

**Conclusion:**

While there are other mistakes that employers make in connection with the FLSA, the above are some of the most common. Employers would be wise to consult with their legal counsel or to self-audit their wage and hour policies and practices to ensure that they are in compliance with the FLSA.

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