

Common FLSA Violations: Mistakes can be Costly

Labor & Employment Law Update

on August 20, 2019

Under the Fair Labor Standards Act (FLSA), employees must be properly classified as either exempt or nonexempt, and nonexempt employees must be paid overtime (1½ times their regular rate of pay for all hours worked over 40 hours in a workweek). All compensation, including commissions and non-discretionary bonuses, must be included in the regular rate of pay for purposes of calculating overtime, unless the compensation is one of eight specified types of payment (e. g., holiday gift, birthday gift, discretionary bonus, and certain profit sharing payments).

Employees may be classified as exempt if they satisfy one of the specified statutory exemptions, the most common of which are the administrative, executive, and professional exemptions. To satisfy these exemptions, an employee has to meet both a salary basis test (be paid at least the minimum required amount of salary each workweek) and job duties test (have certain job responsibilities).

The title of the position is not relevant. The work that the employee is actually performing on a daily basis is the main inquiry.

Two of the most common mistakes made by employers involve misclassification of employees (exempt versus nonexempt) or improper calculation of overtime (did not include all hours worked and/or did not use the correct regular rate of pay). Lawsuits under the FLSA, involving these types of mistakes, have been on the rise the past few years.

Earlier this year, an Indiana automotive service business agreed to pay over \$1 million in overtime back wages and liquidated damages after an audit by the Wage and Hour Division (WHD) of the U.S. Department of Labor found that the company failed to include bonuses, commissions, incentive pay and shift differentials in the regular rate of pay overtime calculations.

On July 1, the WHD issued an opinion letter on the proper calculation of overtime for non-discretionary bonuses (quarterly and annual). A non-discretionary bonus paid, based on the number of straight time hours worked, required the employer to recalculate the regular rate of pay for any period the bonus covered and pay additional overtime. A quarterly bonus paid as a percentage of straight and overtime compensation did not require recalculation of overtime, because the

bonus necessarily included all overtime as a matter of arithmetic.

FLSA lawsuits have been on the rise, in part, because employers face “strict liability” for violations, meaning no defense for honest or unintentional mistakes. Good faith can be a defense to avoid certain penalties, such as liquidated damages, but it is not a defense to the underlying wage, back pay and attorneys’ fees awarded under the statute.

A self-initiated, internal wage and hour audit is an important risk management tool that can identify potential issues and resolve compliance concerns before they result in wage claims. The audit should be done in conjunction with legal counsel.

In addition to reviewing the company’s written pay policies, the company should examine whether employees are properly classified as exempt or nonexempt. The company must first decide whether to review all positions or certain job categories of concern. Such an audit would necessarily include monitoring and assessing the employees’ actual job duties, reviewing the job descriptions, making sure that the job descriptions are updated and accurately reflect what the employees are doing, and then determining on a case-by-case basis whether the employees are properly classified.

In examining pay practices, the company would assess how it calculates and pays wages. For example, are nonexempt employees being paid minimum wage and overtime in compliance with federal and/or state law? Are all applicable payments being included in calculating the regular rate and overtime pay? Are the deductions being made proper?

The company also needs to determine whether all hours worked are being recorded and paid. Questions to ask include:

- Does the company’s timekeeping system provide for accurate recording of hours worked?
- Do nonexempt employees record all hours worked, including time reviewing and responding to emails/calls outside of regular working hours, travel time, meeting time, time worked during unpaid lunch and break times?
- Do the company’s rounding practices comply with applicable law?

Misclassification of employees and miscalculation of overtime can lead to expensive lawsuits or enforcement actions. Taking care to identify and resolve potential FLSA compliance issues before they occur can help to avoid costly mistakes.

Common
FLSA
Violations:
Mistakes
can
be Costly