



Round Up The Usual Suspects

Insights

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Over the last year, dealers have devoted most if not all of their attention to keeping their dealerships afloat. They've spent time cutting staff, combining job duties and slashing costs as they watched extraordinary events unfold in the automobile industry. That has not left much time to study what else is going on around them.

There is no question that the Obama Administration has brought change and will be bringing more in the months ahead. One area where we already see evidence of this is in the U. S. Department of Labor. Hilda Solis, the new Secretary of Labor, has announced that she intends to aggressively enforce the country's minimum wage and overtime laws, and she is hiring 250 new investigators to help her do just that.

It's not surprising that most dealerships have paid little or no attention to their wage-hour compliance since the economic downturn began. Unfortunately, many do not realize that the belt-tightening measures they have taken, coupled with the continued poor economy, has caused many of their employees to lose their exemption from overtime. As a result, many dealerships are now exposed to significant minimum wage and overtime liability at a time when they can least afford it.

The good news is that it is not too late to fix these problems. We strongly recommend that dealerships conduct a comprehensive audit of their compliance by examining the current job duties and pay plans of all their employees to ensure that they are paying overtime wherever it is due.

Over the years, we have audited wage-and-hour compliance at hundreds of dealerships and we have identified the most common wage-hour problems. These ten "usual suspects" are a good place to start your audit.

1. Salespeople who do not punch in and out every day.

There is no fine for failing to keep accurate time records on employees. But without good time records, a dealership cannot prove that its sales people received at least the minimum wage for every hour worked in the pay period. That can lead to significant liability.

2. Sales people who are paid their commissions weekly or biweekly, but the dealership only checks minimum wage at the end of the month.

An employer must normally ensure that employees receive at least the minimum wage on a weekly basis. But if an employee is paid a commission, the employer can use the same period that it pays commissions to check compliance with minimum wage.

So if your dealership pays commissions biweekly, check minimum-wage compliance at the end of the two week period. If you pay commissions monthly, check minimum-wage compliance monthly. What you cannot do is pay commissions weekly or biweekly, but only check minimum-wage compliance monthly.

3. Treating "product specialists" as if they were "sales people."

Some dealers use product specialists instead of sales people. They greet the customer, identify the vehicle they are interested in, do a walk around, and take the customer on a demo drive. If the customer is considering purchasing the vehicle, the product specialist then turns them over to a sales manager who completes the deal.

Although there are no published court cases on this point, a product specialist likely does not qualify for the "salesman" exemption from overtime. This is because the product specialist is not directly involved in the actual sale of the vehicle. Therefore, product specialists will be entitled to overtime if they work more than 40 hours in a workweek.

4. Warranty clerks/warranty administrators who are paid a salary or a salary and a commission.

These employees' duties do not qualify them for an exemption from overtime. (Remember, contrary to popular belief, being paid a salary does *not* make an employee exempt from overtime.) Therefore, these employees are entitled to be paid overtime on all compensation they receive – salary and commission – if they work more than 40 hours in a workweek.

5. Bookers and dispatchers who are paid a salary or a salary and a commission.

These employees' duties also do not qualify them for an exemption from overtime. Therefore these employees are entitled to be paid overtime on all compensation they receive – salary and commission – if they work more than 40 hours in a workweek. An alternative would be to structure their pay plan to make them exempt from overtime under the "commission-paid" exemption.

6. Foremen who are paid a salary or a salary and a commission.

Foremen do not manage the service department nor do they spend the majority of their time turning wrenches. That means that they do not qualify for either the "executive" or the "mechanic" exemption from overtime. As noted above, being paid a salary *does not* make them exempt either. They may be exempt from overtime – but only if their pay plan qualifies them for the "commission-paid" exemption from overtime.

7. Detailers who are paid hourly with overtime but who also receive a bonus or spiff.

Detailers do not perform skilled mechanical work and therefore cannot qualify for the "mechanic" exemption from overtime. Therefore, they must receive overtime premium on all of the

compensation – including their commissions or bonuses.

8. Detailers who are paid by the flat-rate hour, but who do not receive at least \$10.88 per clock hour.

Detailers who are paid on a flat-rate-hour system are exempt from overtime only if they can qualify for the "commission-paid" exemption. This is different from the "mechanic" exemption that we use for techs. The "commission-paid" exemption requires that they receive the majority of their compensation in the form of commissions (a "flat rate" system is usually considered a commission), **and** they must also receive at least 1½ times the federal minimum wage for every hour worked in an overtime week.

That means that a dealership must check to ensure that these employees flagged enough time to cover \$10.88 times their clock hours each pay period. If not, the dealership will need to supplement their flag time to bring them up to that amount.

9. Assistant managers who do not receive overtime.

There is no "manager" exemption from overtime. Some managers are exempt from overtime because they qualify for the "executive" exemption from overtime which requires, among other things, that their "primary duty" is the management of a department at the dealership. Assistant managers generally cannot qualify for this exemption because they are not managing the department – the department manager is. It's not enough that the assistant fill in when the manager is at lunch or on vacation. These employees should be paid overtime unless they qualify for some other overtime exemption.

10. BDC employees who are paid a salary and a bonus.

Business Development Center employees at most dealerships do not qualify for any exemption from overtime. Therefore, they must receive overtime premium on their entire compensation if they work more than 40 hours in a workweek.

Bonus Suspect: Any employee – other than a major department head – with the title of "manager."

Most dealerships have a number of employees who carry the title of "manager" and who are treated as being exempt from overtime. But again, there is no overtime exemption for "managers." These employees are exempt *only* if they meet all of the requirements of the "executive" exemption.

That exemption requires that they are in charge of a recognized department, supervise the work of two or more full-time employees, have the authority to hire and fire, and receive a salary in excess of \$455/wk. Most dealership "managers" – other than department Managers – will not qualify for this exemption and so must be paid overtime on all of the compensation they receive.

Compliance with the federal wage-hour law is complicated and is not something a dealership can "set and forget." As wages change and duties change, so, too, does an employee's eligibility for exemptions. In addition, while this article deals only with federal law, dealerships must also comply

with their state wage-hour laws which are also complicated and sometimes conflicting. As a result, dealerships need to be aware that almost every employee can be a back wage time bomb.

Nevertheless, we know that a dealership can get into compliance *without* increasing its labor costs. We also know that if your dealership conducts a thorough audit, starting with "the usual suspects," you can greatly reduce your exposure to these kinds of claims.