



## It Happened Again...

Insights

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WARNING: If you are a regular recipient of the Dealership Update or a Fisher Phillips client, chances are that you will not necessarily learn anything new by reading this article. When you hear that a dealership settled a wage and hour claim, you will likely understand without explanation why the U.S. Department of Labor concluded the dealership was not in compliance with federal law and why the dealership decided to resolve the matter. If for no other reason, however, you still should read this article so that when you get to the end, you can have the satisfaction of saying “I already knew that!”

### **No Sales Equals No Pay, Right? Wrong.**

Let’s start with a hypothetical. Imagine that your salesperson—who is exclusively paid by commission—has a tough week at work and sells nothing at all. During that same week, he attended a number of sales meetings (even though his attendance at these meetings obviously did not help him succeed). Since, despite his best efforts, he had no sales and earned no commissions, you owe him nothing for the week, right?

Wrong, as a Tennessee dealership recently learned. It paid approximately \$60,000 to resolve Fair Labor Standards Act (FLSA) claims stemming from a Labor Department investigation into a fact pattern like the one described above. And that dealership was somewhat lucky; had the pay claims been brought in court, the settlement price likely would have been more than double that amount and would have also included attorneys’ fees.

### **Do You Know The Right Steps?**

Although dealerships are not required under federal law and many state laws to pay overtime premium to employees who qualify as salespersons, they are required to pay each salesperson at least minimum wage for all hours worked, even those who have no sales. “Hours worked” generally includes time spent in training and in meetings, another lesson learned by the Tennessee dealership. This same minimum wage requirement applies to the technicians, service advisors, and “partsman” who qualify for this overtime exemption under federal law.

To ensure compliance with this decades-old requirement, the first step is to maintain an accurate record of hours worked by the salespersons (and others subject to this exemption), a task in many situations akin to herding cats. “Hours worked” generally includes time spent in training, attending sales meetings, vehicle deliveries on a day off, and all other work-related activities.

Unless and until you have these accurate and complete records, calculating minimum wage compliance properly will be difficult, if not impossible. Beware that if your dealership has not met its legal obligation to maintain a complete and accurate record of hours worked, the employee's "record" of hours worked will be the one relied upon by the Labor Department or the court to determine legal compliance.

Once you have the total number of "hours worked" for the week, you simply divide that number into the employee's total compensation for that week. You can use all forms of compensation earned in that week for the calculation. If the answer is at least \$7.25 (current federal minimum wage), your dealership has met its legal requirement under federal law to pay at least minimum wage. If the answer is less than \$7.25, your dealership is required to make up the difference by paying supplemental or make up pay to the employee, even if the employee does not want to be paid the makeup pay.

Before concluding that your pay practices are compliant with legal requirements, always remember to check state and local law as well. Not all states, cities, and counties have applicable wage and hour laws, but many have requirements that differ from federal law and require a higher minimum wage. When there is a conflict between these laws and federal wage and hour law, the law that is most beneficial to the employee will be the one applied.

### **Final Warning: Do You Need An Audit?**

One more thing. Now that you know your obligations under the specific federal overtime laws, are you sure that all your salespersons, techs, advisors, and partsmen actually qualify for this exemption? What about those in the BDC or internet sales? What about your product specialists, and those who explain to customers how to operate the electronics? What about lube techs and get-ready techs? You might want to consider a compliance audit if you are unsure about any of these positions.

Ensuring compliance with the FLSA's recordkeeping and minimum wage obligations reduces the risk of compliance issues. A thorough FLSA compliance audit should further reduce those risks. Having expert help with the audit should reduce those risks even further. And, with all the recent attention on dealership pay issues, there may be no better time than now to conduct that compliance audit.

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