



Wage-Hour Compliance Steps to Avoid Expensive Problems

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Wage-hour compliance continues to be a pressing challenge for businesses, and recent developments make things even more “interesting” for responsible executives and managers. Courts have recently emphasized that such individuals in management can sometimes be held personally liable for unpaid wages and other payments due to employees under the Fair Labor Standards Act (FLSA).

To **reduce exposure to wage-hour claims, businesses should focus on prevention**. Taking steps that bring pay practices into compliance can immediately save money by stopping the continuing accumulation of back pay. Specifically, each new week in compliance means one less week of exposure to back wages for the 2-year (or 3-year) look-back period.

In this series of 3 articles, we suggest practical steps for management to take and essential questions that executives should be asking their management team. This Part 1 of our series deals with frequent problems involving non-exempt (hourly) employees. Part 2 will deal with exemption issues. Part 3 will deal with assorted problems.

Questions for Managers

Do we pay any kind of bonuses to our hourly (non-exempt) employees? If so, do we calculate and pay additional overtime pay due on the bonus?

Some managers say “huh?” when they hear the second question. Failure to calculate and pay the overtime pay due on certain bonuses is perhaps one of the most common FLSA violations in the country.

The short explanation of this problem is that most “extra pay” to non-exempt employees must be included in the “regular rate of pay” when the employees work overtime hours during the period for which the payments were made. Examples in this category can include performance bonuses, commissions, attendance bonuses, safety bonuses, etc.

One bright spot: a properly designed bonus-payment formula that pays a bonus that is a previously announced percentage of all pay (the employee’s regular pay and his overtime pay for the bonus period) is a bonus payment which has overtime pay “built in” and does not require further calculations.

Some payments are excluded from these calculations (such as certain gifts at Christmas, truly discretionary bonuses and certain premiums paid for work on special days), but the default rule is that all payments to non-exempt employees are included in overtime pay calculations unless specifically excluded by the FLSA.

Do we clearly understand what counts as “hours worked” and do we count all such time toward overtime?

Typical trouble spots here include rules on meal periods, breaks, on-call time, training or meetings, early and late work, work at home, travel time, etc. Lawsuits for off-the-clock work are also common, and management needs to be aware of the rules, then monitor their enforcement and accurate record-keeping. The company (technically not the employee) has the legal duty to keep an accurate record of all hours worked by each non-exempt employee.

Do we have a written policy explaining which travel time does count as hours worked and which does not?

The federal rules on when the company must count (or need not count) certain types of travel time as hours worked can usually be summarized in a policy that is about one page long. Still, applying those travel time rules can sometimes be tricky. If your company has a written policy, that's good for you. But if the policy has not been reviewed by a wage-hour lawyer, you might need to address that.

Do we have any formal (or informal) system of banked “comp time” for non-exempt employees?

The use of “comp time” (as a way of paying for overtime hours by granting “paid time off” in a later week for overtime hours worked in an earlier week) is prohibited for private sector employers but not for public sector (governmental) employers. However, an employee who works long hours on some days in the workweek can be sent home early on later days in the same workweek so that the total hours actually worked that week do not exceed 40 hours. That is legal because it does not involve “comp time” in the FLSA sense.

Do we avoid those pay deductions that are not allowed to “cut into” the minimum wage or “cut into” any overtime pay due?

The FLSA prohibits certain deductions from cutting into the employee's minimum wage pay for the first 40 hours in the week (or cutting into any of the employee's overtime pay due for the week). Examples are deductions for tools, equipment, supplies, business mileage costs, shortages, uniforms, or unreturned company property.

In summary, prevention through compliance programs will continue to be essential to avoid expensive problems such as lawsuits, USDOL investigations, back-wage payments, double damages, penalties, etc.

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