Are You Paying More Than You Must?

Insights
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Employers sometimes pay workers more than the federal Fair Labor Standards Act requires. Of course, some do so as a matter of choice.

However, in other situations, this happens because management misunderstands what its legal obligations are. Among the potentially expensive misconceptions about the FLSA's principles are:

- *"Paid Time Off Must Be Counted As Hours Worked."*

The FLSA does not compel employers to treat paid time off as worktime (provided that the employee is in fact not performing any work, including not being "engaged to wait"). For instance, assume that Barb works 36 hours on Monday through Thursday of her Monday-through-Sunday workweek. She performs no work of any kind on Friday, because it is a holiday. Under ABC Corporation's holiday policy, she receives pay for that holiday equal to eight hours times her normal hourly rate. She does no other work in the workweek.

ABC Corporation is not required to treat Barb's eight holiday hours as FLSA worktime, so under that law she has worked only 36 hours – *not* (36 + 8) = 44 hours. In other words, even though she is paid for 44 hours (36 hours worked, plus 8 unworked holiday hours), none of those hours has to be paid for at FLSA overtime rates.

- *"Employees Must Be Allowed To Work Their Full Schedules."*

Nothing in the FLSA prevents an employer from reducing the hours worked in a workday or workweek, or from sending employees home before they have worked their usual schedules. This is lawful under the FLSA, even if it is done in the interests of reducing the amount of work performed so as to avoid paying any overtime wages.

As an illustration, suppose that ABC Corporation's non-exempt employees have already worked 36 hours each on Monday through Thursday of their Monday-through-Sunday workweek. If they work a full eight-hour schedule on Friday for a total of 44 hours worked in the workweek, the FLSA overtime pay due for the four overtime hours will be more than the budget can stand. Management sends each employee home after he or she has worked no more than four additional hours on Friday, and the employees perform no other work in the workweek, such that no employee has worked more than 40 hours in the workweek. This is perfectly acceptable under the FLSA.

- *"An Employee Must Be Paid The Same Rate For Each Kind Of Work."*

This is not so; the FLSA permits employers to assign different hourly rates (of not less than its minimum wage) to different kinds of work. Naturally, this may not be done in a way that has the purpose or effect of unlawfully evading the FLSA's overtime requirements. *See*, *e.g.*, 29 C.F.R. Part 778, Subpart F.

Consider this example: Each Sunday afternoon, Construction Company's equipment operators are required to drive themselves and their tools and heavy equipment to the location at which they will perform their work beginning on Monday morning. Management knows that this Sunday activity counts as compensable worktime under the FLSA, but it does not want to pay the operators their same high hourly rates for this work. The FLSA permits Construction Company to pay a lower hourly rate of not less than the minimum wage for the Sunday work.

The Bottom Line

It is wise to take a fresh look periodically to ensure that compensation practices are not unintentionally pushing wage costs higher than is legally necessary under the FLSA. Of course, employers must also consider whether other, non-FLSA limitations restrict their alternatives, such as the requirements of another applicable law or of a union contract.