



FLSA Famous Last Words . . .

Insights

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There has always been a great deal of mistaken conventional wisdom afoot where the federal Fair Labor Standards Act is concerned. We have blogged [elsewhere](#) about the common misconception that one pay practice or another has just *got* to be lawful, because, well, "everybody does it" that way.

But this is by no means the only one. Among others that continue to crop up all-too-often are:

♦ ***"Salaried Employees Don't Have To Be Paid Overtime"***

The truth is that only salaried employees *who meet all of the requirements to be exempt from FLSA overtime* need not be paid FLSA overtime compensation. This is also true as to employees paid piece-rates, day-rates, commissions, and in many other ways than the perhaps-more-traditional hourly basis.

Furthermore, the employer must be sure that an FLSA-overtime-exempt employee in a jurisdiction imposing its own overtime requirements also qualifies for exemption from *that* provision.

♦ ***"This Is What Our Employees Want Us To Do."***

If a compensation practice does not comply with the FLSA, then the fact that the affected employees urged the employer to implement it or to continue it is not a reliable defense to FLSA liability. This is sometimes what leads employers to adopt an unlawful "comp time" policy giving non-exempt employees paid-time-off later in lieu of the FLSA-required overtime compensation.

♦ ***"Our Employees Agree To What We Do."***

This is broader than the preceding misapprehension. For example, some employers believe that, if an employee signs an agreement allowing it, they can withhold all of his or her final pay until the employer's property has been returned. Again, having an employee agree to something that the FLSA prohibits does not trump the FLSA.

♦ ***"Our Employees Will Actually Make More Money This Way."***

FLSA compliance can depend upon more than just comparing the amount the employee is actually

paid to how much he or she would receive under the FLSA if the facts were different. As an illustration, assume that a non-exempt employee is due \$400 in sales commissions for a workweek in which he worked 50 hours. If he had instead been paid by the hour at the FLSA minimum-wage rate of \$7.25, his FLSA-required wages would have been:

$$(\$7.25 \times 40 \text{ ST Hrs.}) = \$290 \text{ ST Pay}$$

$$(\$7.25 \times 1.5 \times 10 \text{ OT Hrs.}) = \$108.75 \text{ OT Pay}$$

$$(\$290 + \$108.75) = \$398.75.$$

Even though his commission pay is more than this hourly calculation, paying him only the commissions will not comply with the FLSA. The fact is that he was *not* paid on an hourly basis at the FLSA minimum wage. Instead, he was paid on a commission basis, and his commissions represent only his straight-time wages. Under the FLSA he is due:

$$(\$400 \div 50 \text{ Hrs.}) = \$8.00 \text{ Per Hr. Regular Rate}$$

$$[(\$8.00 \div 2) \times 10 \text{ OT Hrs.}] = \$40 \text{ OT Premium Pay}$$

$$(\$400 + \$40) = \$440.$$

Don't Be Misled

Erroneous beliefs about the FLSA have plagued employers for years. One difference is that, today, there is far more risk that they will lead to U.S. Labor Department investigations and/or to FLSA lawsuits.

Employers should be *certain* that none of their pay practices rests upon an incorrect understanding of the FLSA's principles and requirements.