FLSA Compliance:
Top 10 Wage and Hour Mistakes

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Who is covered by FLSA?
The Bottom Line

- Almost every employee in the United States is covered by the FLSA
Failing To Prevent (or to pay for) Unauthorized Overtime Work
Overtime Pay

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek.
- Workweek is 7 consecutive 24 hour periods (168 hours).
- Each workweek stands on its own.
Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek.
- May not be less than the applicable minimum wage.
Unauthorized Overtime - The Traps

Knew or Should Have Known Issue:

• Seeing employee on premises before/after shift
• Directing work that could only be accomplished by working off the clock (“this must get done before you leave”)
• Observing more work being accomplished than could be expected while on the clock (for example, performance reviews at home)
Action: Clear Overtime Policies

- Management approval required to work overtime
- No working off the clock
- Never punch in/out for another employee
- Discipline for violators
Failing To Pay For “Off The Clock” Work
Suffered or Permitted

- Work not requested but suffered or permitted is work time

**Work Includes:**

- Work done "at home," or at a place other than the normal work site
- Work done on the way home, such as stopping by the post office to drop off company mail
Technology Traps

- Answering e-mails via mobile device or computer at home
- Answering work-related calls while driving
- Frequency of calls, emails, or pagers
Travel Time

- Commuting time to/from work is not work time
- Travel time which is “all in a day’s work” is work time.
  - Travel to first job site not work time.
  - Travel between job sites is work time.
  - Example: employee who travels to the office, picks up equipment, then goes to a work site to perform the day’s activities is working from the time s/he first arrives at the office until he/she returns to the office.
On-Call Time

- “Engaged to be waiting” (compensable) vs. “waiting to be engaged” (not compensable)
- Ultimate question is whether employee can effectively use on call time for his/her own purposes
- Some restrictions on employee permissible without the time becoming compensable
Failing To Monitor And Maintain Accurate Time-keeping Records
Recordkeeping

- An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems.
- The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records.
Employer Has the Burden

- In the event of an audit or a lawsuit, employers have the burden of establishing compliance with wage and hour laws.
- If you do not have records supporting your position, it will be assumed that you have NOT complied with the FLSA.
Impermissible Rounding
The Rules on Rounding

- Permissible to round time to nearest quarter hour.
- Rounding must not be one-sided.
- Records must accurately reflect time worked (no time shaving/alteration of time worked).
Failing To Properly Record and/or Pay For Lunch Or Break Times And Training Periods
Break/Meal Periods

- Break/Meal periods are **not** considered working time and need **not** be paid if:
  - 30 minutes or more in duration (but sometimes less) and
  - employee is **relieved** of all duties

- It’s not just formal working lunches that must be paid – eating at your desk can be working time
Action – Education and Documentation

- Educate employees and managers about expectations regarding breaks, meals, and training
- Document your policies
- Be wary of any “automatic” deductions for meals or breaks
- Ask employees to clock in/out for meal breaks
Paying “Comp Time” To A Private, Non-governmental Employee
Failing To Understand What Constitutes An Independent Contractor
Employee or Independent Contractor (Economic Realities Test)

- The extent to which the work performed is an integral part of the employer’s business
- Whether the worker’s managerial skills affect his or her opportunity for profit and loss
- The relative investments in facilities and equipment by the worker and the employer
- The worker’s skill and initiative
- The permanency of the worker’s relationship with the employer
- The nature and degree of control by the employer
The Test for Independent Contractors

- Amount of control.
- Distinct occupation.
- Amount of skill required.
- Who supplies the instrumentalities, tools, and the place for doing the work.
- Length of time.
- Method of payment – by time or by the job.
- Duties performed as part of the regular business.
- The understanding of parties.
Taking Impermissible Deductions From The Pay Of Non-Exempt Employees
Deductions

- Deductions from pay illegal if
  - For item considered primarily for the benefit or convenience of the employer; and
  - Deduction reduces employee’s earnings below required minimum wage
Be careful of slipping below minimum wage

Common traps:
- Uniform expenses
- Deposit discrepancies
- Cash shortages
- Tools
Taking Impermissible Deductions From The Pay Of Exempt Employees
Permitted Deductions

1. Absence from work for one or more full days for personal reasons, other than sickness or disability.

2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences.

3. To offset any amounts received as payment for jury fees, witness fees, or military pay.

4. Penalties imposed in good faith for violating safety rules of “major significance.”
Permitted Deductions

5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules.

6. Proportionate part of an employee’s full salary may be paid for timely actually worked in the first and last weeks of employment.

7. Unpaid leave taken pursuant to the Family and Medical Leave Act.
Failing To Understand Exemptions
“White Collar” Exemptions

- The most common FLSA minimum wage and overtime exemption – often called the “541” or “white collar” exemption – applies to certain:
  - Executive employees;
  - Administrative employees; and
  - Outside sales employees.

- There is a “duties” test and “salary basis” test for each.
Duties Test

- Common to all is a “primary duty” test.
- “Primary duty” means “the principal, major, or most important duty performed by the employee.”
- Time spent performing exempt work is **not** the sole test. Employees who spend more than 50 percent of their time performing nonexempt work **may** be exempt if they are not “closely supervised and do not earn only a little more than nonexempt employees.”
Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.
- The concurrent performance of exempt and nonexempt work does not disqualify the exemption.
- Assistant manager in a fast food restaurant can serve customers, cook food, clean equipment, and direct the work of subordinates at the same time.
Administrative Exemption

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
“Directly Related to the Management or General Business Operations”

- Refers to the type of work performed
- Assists with the running or servicing the business
- **Functional** areas common to almost all businesses
- Tax, finance, accounting, budgeting, insurance, quality control, purchasing, advertising, computer network, legal compliance, human resources, personnel administration, etc.
Discretion And Independent Judgment With Respect To Matters Of Significance

“Discretion and independent judgment”—

- Comparing and evaluating options.
- Deciding and acting after considering the options.

“Matters of significance” refers to the level of importance or consequence of the work performed. Does not have to be final decisionmaker.
Discretion And Independent Judgment —
Questions To Consider

- Formulate, interpret, or implement policy?
- Carries out major assignments?
- Authority to commit employer in matters that have significant impact?
- Authority to waive or deviate from policy?
- Authority to negotiate and bind the company?
- Involved in planning business objectives?
- Provides expert advice to management?
Outside Sales Exemption

• Primary Duty
  • Making sales; or
  • Obtaining orders or contracts for services or for the use of facilities for which the client or customer pays

• Generally, activities must occur away from employer’s place of business
Questions?