



## FLSA COMMON PITFALLS; EMPLOYERS BEWARE

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There has undoubtedly been an uptick in Fair Labor Standards Act (FLSA) wage-and-hour class and collective actions. Given the increase in FLSA related actions, the complexity related to the below-referenced issues, and the steep penalties for violations, now may be the time for a wage-and-hour audit to proactively address any possible issues and discuss best practices. The following list provides the most common pitfalls for consideration:

### 1. Travel Time, Time Spent On-Call, Work Provided Cell Phones, Walk Time, Boot-up Time, Donning and Doffing

Time spent “off the clock” continues to be a leading issue in wage-and-hour matters. These matters must be reviewed on a case-by-case, industry-by-industry basis.

**Example Violation:** Non-exempt employees answer e-mails after hours at the direction of or with the implicit approval of their supervisor.

### 2. Compensatory Time in Lieu of Overtime

Compensatory time in lieu of overtime is only available to public agencies. Private-sector employers are prohibited from offering such an arrangement to its employees.

**Example Violation:** An employee works 4 hours of overtime and is offered to take 4 hours of time off at a later time by a private sector employer.

### 3. Misclassification

- Misclassification of Employees as Exempt: There is a common misconception that a salaried employee is automatically an exempt employee. This is simply not accurate. There are three tests that must be met in order to properly designate an employee as exempt: the minimum salary test; the salary basis test; and the duties test. Employees who cannot fulfill any one of these tests must be considered non-exempt and therefore entitled to minimum wage and overtime.
- Misclassification of Employees as Independent Contractors: There are numerous factors that are considered when determining whether an employer-employee relationship exists, which determination has implications not only under the FLSA, but for agencies such as the Internal Revenue Service, workers' compensation agencies, and unemployment agencies. The law and applicable tests for determining this relationship are regularly revised and revisited by government agencies and courts alike.

### 4. Repercussions for Excluding Class Action Waivers from Arbitration Agreements

Based on recent Supreme Court case law, it is clear that employers may, and should, include class action waivers in their employment arbitration agreements. Not including such a provision is a missed opportunity to avoid significant financial liability.

### 5. Improper Rounding

An employer may round time to determine an employee's hours worked provided that doing so “will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” 29 C.F.R. § 785.48(b). Generally, the Department of Labor (DOL) has accepted rounding to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour as long as the rounding averages out to proper compensation. Notably, an employer may be in violation of the FLSA if it always rounds down.

### 6. Improper Docking of Salaried Exempt Employees

Generally, an employer may not take a deduction from the salary of an exempt employee's pay, except in very narrow circumstances. Indeed, a salaried exempt employee earns their entire salary for a workweek by working



even a single minute during that workweek.

**Example Violation:** An exempt employee takes two hours off during the workday to take his child to the dentist. The employer deducts two hours of time at the hourly equivalent of his salary from his next paycheck.

## 7. Deductions for Breaks and Meal Periods

While federal law does not require lunch or rest breaks, it does address when these breaks are counted as hours worked. Rest breaks, typically lasting between 5 and 20 minutes, are generally compensable time. Lunch breaks, typically lasting at least 30 minutes, are generally not considered compensable time. If, however, an employee is not completely relieved from his or her work duties during the lunch break, that time is compensable.

**Example Violation:** An employee is permitted an hour lunch break but is expected to respond to client e-mails during his/her lunch break. If the employee is not compensated during this time, the employer faces liability.

## 8. Mis-Calculating Overtime

Employers are incorrect to assume that an employee's regular rate – which is used to calculate overtime – is simply an employee's base hourly rate. Rather, the regular rate must include most payments earned by an employee including base wage; premium pay; shift differentials; commissions; certain bonuses; piece rates; and various allowances for lodging and meals.

## 9. Volunteer Time

Employees may not volunteer services to for-profit private sector employers. Individuals can volunteer services to non-profit and public sector employers. However, employees of non-profit or public sector employers may not volunteer additional time to do the same work for which they are employed.

**Example Violation:** An employee of a not-for-profit organization has various job duties for which she is paid, one of which includes making telephone calls to local businesses in pursuit of new donors. The employer requests that this employee come in on his/her day off to collaborate with other team members on new strategies for reaching new donors. This "volunteer time" would violate the FLSA, no matter how willing the employee was to perform it.

## 10. Outside v. Inside Sales Employees

One group of employees exempt from overtime pay under the FLSA are "outside sales" employees. The primary difference between outside and inside sales is that to qualify for the outside sales exemption, the employee must "customarily and regularly" be "engaged away from the employer's place or places of business."

**Example Violation:** An employee makes sales by telephone or Internet and is designated as an exempt "outside sales" employee. This employee's sales would not qualify as "outside sales" because they have not been made at the customer's place of business/home.

Violating the FLSA may result in any of the following:

- The Wage and Hour Division may require payment of back wages;
- The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages;
- An employee may file a private suit on behalf of an individual, or a class action or collective action for back pay and an equal amount as liquidated damages, plus attorney's fees – which often times exceed the actual damages – and court costs;
- The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

While a two-year statute of limitations generally applies to the recovery of back pay, a three-year statute of limitations applies for willful violations.



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