

10 Overtime Practices that Can Land You in Hot Water

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With new overtime rules effective December 1, 2016, employers' overtime practices may face more scrutiny. To help you prepare, here are 10 practices to avoid.

#1: Unauthorized overtime will not be paid.

Under the federal Fair Labor Standards Act (FLSA), overtime must be paid whenever an employee works more than 40 hours in a workweek (some states require overtime in additional circumstances), regardless of whether it was authorized in advance. Employers may have a policy that requires employees to obtain permission before working overtime, but if employees violate the policy, they are still entitled to overtime. While employers may discipline employees for violating the policy, they may never withhold overtime pay.

#2: Giving time off instead of paying overtime.

Employers in the private sector are prohibited from giving employees time off instead of overtime pay, a practice referred to as "comp time." With certain conditions, state and local governments may offer comp time in lieu of overtime pay.

#3: Neglecting to count all "hours worked" when calculating overtime.

Under the FLSA, hours worked includes not only productive time (time actually spent working) but also certain nonproductive time, such as rest breaks, travel time, and training time. For non-exempt employees, all of this time must be included when determining whether overtime is due.

#4: Requiring or allowing off-the-clock work.

Non-exempt employees must be paid for all the time they spend working. Employers can't ask or allow these employees to work "off-the-clock." Employers should have a policy that expressly prohibits off-the-clock work and have controls in place to prevent it.

#5: Paying overtime at a flat sum (such as \$500 for all overtime worked).

Employers must calculate and pay overtime to non-exempt employees on a per-hour basis. Employers may not pay employees a flat sum for all overtime worked, even if it would be greater than what is owed on a per-hour basis.

#6: Calculating overtime based on the employee's hourly rate only.

Overtime must generally be paid at one and a half times the employee's "regular rate of pay." An employee's "regular rate of pay" includes their hourly rate plus the value of nondiscretionary bonuses, shift differentials, and certain other forms of compensation. Failure to include all of the compensation that must be factored in can result in underpayment of overtime.

#7: Improperly applying the fluctuating workweek method when calculating overtime.

To use the fluctuating workweek method under the FLSA the:

- Employee's hours must fluctuate from week to week (above 40 hours and below 40 hours);
- Employee must receive a fixed salary for the workweek, regardless of how few or many hours are worked;

- Employee and employer must have a clear mutual understanding (which should be in writing) that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek;
- Salary must meet the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours worked is greatest; and
- Employee must receive one and a half times his or her regular rate of pay for overtime hours worked. Since the salary is intended to compensate the employee at straight time rates for the hours worked in the workweek, his or her regular rate will vary from week to week. To determine their regular rate for a particular workweek, divide the number of hours worked in the workweek into their salary.

While the fluctuating workweek method can seem like an attractive option for reducing overtime costs when compared with the standard overtime calculation, there are some caveats to consider. First, some states, including California, expressly prohibit employers from using the fluctuating workweek method for paying overtime. There are also more restrictions on the types of deductions that employers can make. This method is a common source of employee lawsuits. Check your state and local law and consult legal counsel as necessary before using this method.

#8: Averaging hours worked over two (or more) workweeks.

Overtime must be calculated on a per workweek basis. Under the FLSA, if the employee works more than 40 hours during a workweek, the employee is entitled to overtime pay. Employers are prohibited from averaging hours over two or more workweeks. For example, if an employee works 50 hours one workweek and 30 hours the next, the employee would be entitled to 10 hours of overtime for the first workweek.

#9: Docking overtime pay.

Under the FLSA, employers may make deductions from an employee's pay for uniforms and certain other items. However, deductions are prohibited if it would cut into the employee's overtime pay (or reduce their regular pay below the minimum wage).

#10: Asking employees to waive their right to overtime.

Under the FLSA, non-exempt employees are entitled to overtime whenever they work more than 40 hours in a workweek. Employees cannot waive this right even if they were to do so voluntarily.

Conclusion:

Review your overtime practices carefully to ensure compliance with federal, state, and local overtime rules and make sure your supervisors understand your company's overtime obligations.