



ESSENTIAL TIMEKEEPING PRACTICES FOR NON-EXEMPT EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT

1. Who is a Non-Exempt Employee?

Under the federal Fair Labor Standards Act (“FLSA” or the “Act”), any employee who is not specifically exempt from overtime is called a non-exempt employee. Non-exempt employees include both hourly and salaried workers who do not meet any specific test to be qualified as exempt from overtime under the FLSA. Non-exempt employees must be paid overtime for all hours “actually worked” in excess of 40 hours in any single workweek at a rate of 1 ½ times the “regular rate” of pay. The failure to accurately record an employee’s hours worked, to pay overtime due or to properly calculate overtime are violations of the Act, and may be enforced either by the Department of Labor (“DOL”) or through private judicial proceedings.

2. Who has the Burden of Proof of Hours Worked?

If an employee files a complaint with the DOL or in a court of law for unpaid wages, the burden of proof is on the employer to show compliance with the FLSA. Therefore, it is important that time worked for all non-exempt employees be recorded accurately, either electronically, through a time clock or timesheet method. Employees should be required to approve recorded time each week by either their signature or computer program to confirm that the hours recorded are accurate.

3. What Hours must be Recorded as Time Worked?

Holidays, sick days, vacation days and other days for which an employee is paid when he or she is absent from work do not count toward the 40-hour requirement before overtime must be paid. For salaried, non-exempt employees, it is generally calculated based on a 40-hour workweek, which is divided by the weekly salary earned to obtain the regular hourly rate. Once the hourly regular rate is obtained, all hours over 40 in any given workweek is paid at time and one half that rate. Certain states, such as California, have additional overtime rules, making it important to check state overtime regulations along with the federal FLSA. In states like Texas, no state overtime rules exist so that compliance with the federal FLSA is sufficient.

Included in the workweek, however, are hours that an employee spends performing any services for the employer, which necessarily encompass on-call time, hours on-duty and hours performing errands for the employer prior to work, during work or after work. Because employees use personal computers and smart phones to check e-mails and perform other work-related functions, accurately recording employee work time is more difficult. It is particularly important to record all breaks of over 20 minutes such as lunch breaks or other time that an employee is away from work. Failure to record those breaks will result in those hours being counted as part of the compensable workday.

4. What is Required to Correct Improperly Recorded Time?

As part of company policies and procedures, the company should establish a well-defined policy for employees to report improperly recorded time. Develop a process by which time keeping errors will be corrected in a prompt and efficient manner. Employees should be given a window of opportunity to make complaints concerning timekeeping errors with the promise that no retaliation will occur for making such complaints. This will ensure that time is correctly recorded and discourage potential claims that the employer had no procedure in place to correct improperly recorded time, potentially allowing an employee to claim that he or she is entitled to unpaid wages for time worked that was not properly recorded by the employer.

5. Best Practices for Establishing a Timekeeping Procedure.

- Make sure that employees are correctly classified within the company as exempt or non-exempt. Exempt employees often are not required to complete time records. If an exempt employee is later re-classified by the DOL as non-exempt, there may be no record of time actually worked. In that instance, an employee may use his or her own personal calendar or other personal records to submit a claim for unpaid overtime wages.
- Make sure that policies and procedures include a prohibition against clocking in or out or signing in or out for other employees. This should be a violation of company policy subject to disciplinary action.
- Make sure that timesheets or timecards are signed by the employee prior to issuing a paycheck for that work period. Employees should be required to confirm that the hours recorded by the company are accurate.
- Make sure that all managers are trained in the FLSA overtime requirements and the company's timekeeping policies and procedures. Managers must not encourage employees to work off-the-clock by not reporting hours actually worked in an effort to avoid overtime obligations.

The information contained in this article is not designed to address specific situations, and does not include rules or regulations that apply to all states. If you have questions concerning this topic, you should consult with legal counsel of your choice to obtain advice on various fact specific matters.

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