TOP 10 FLSA MISTAKES

AVOID THESE TOP 10 MISTAKES TO STAY IN COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT.

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Lawsuits under the Fair Labor Standards Act (FLSA) continue to dominate federal court dockets. According to the Department of Labor’s Wage and Hour Division, the division recovered more than $240 million from employers on behalf of more than 270,000 workers during fiscal year 2014. Given the high cost of an FLSA lawsuit or a Department of Labor (DOL) investigation, it is critically important for employers to “get it right.” Many times, the issues that lead to FLSA lawsuits are unintended violations of the law. To assist employers in avoiding these costly mistakes, this article will explore 10 FLSA mistakes that are often litigated in federal courts.

**Mistake No. 1: Not Accounting For “Interrupted Meal Breaks” When Automatically Deducting Time for Meal Breaks**

Under the FLSA, if an employer gives an employee a meal break, the employer does not have to pay for that meal break providing: (1) the meal period lasts at least 30 minutes; (2) the employee is “completely relieved from all duties during the meal period;” and (3) the employee is free to leave the duty post. In addition, several states require employers to provide workers an uninterrupted meal break. These states do not require the employer to pay for the meal break, but if the employee works during any part of the break, he or she must be compensated.

Although employers may require employees to remain on the Company premises during their meal periods, they cannot require employees to remain at “their duty post.” In fact, we recommend that employees not be permitted to remain at their desks or in their work area during an unpaid lunch so as to reduce the chances of them performing any work during their meal periods. Whether employees are allowed off-site or not, managers should be trained not to interrupt nonexempt employees’ meal periods with pages, texts, emails, or phone calls, and if they do, be prepared to pay for that meal period.

We believe that it is important for employers to have a strict policy prohibiting employees from working during an unpaid meal period. If an employee is required to work during the meal period, the employer needs to determine (1) how much time was spent on the interruption; and (2) whether the entire meal period should be compensated. Recently, many employers have found themselves the target of a collective action lawsuit concerning the automatic deduction of meal breaks from nonexempt employees’ time. That is, many employers who provide unpaid meal breaks to their employees have instituted pay policies that automatically deduct 30 minutes (or other time periods as applicable) from an employee’s time card under the assumption that the employee will take the uncompensated meal break. Because the FLSA requires that employees be compensated for all “hours worked,” if an employee is interrupted for work purposes during a lunch break (e.g. a nonexempt hospital staff employee’s lunch break may be interrupted so that he or she can attend to a hospital emergency), that time may need to be compensated. Thus, the automatic deduction system of accounting for time worked needs to be adjusted to account for interrupted meal breaks.

There is some debate in the courts as to whether the employer violates the FLSA by placing the burden on the employee to inform the employer that he or she was unable to take an interrupted meal break. There has
Another issue concerning “interrupted meal breaks” occurs when employees are away from their normal work areas during meal breaks but they have a company cell phone or pager with them, and receive work related calls or pages (or emails or texts on a personal device.) If an employee spends time during an uncompensated meal break performing work related tasks, the employer must compensate the employee for that break time. To avoid this risk, employers should implement a written policy that prohibits employees from taking their work cell phone and/or pager with them during breaks. If this practice is not possible, the employer should have a policy that instructs employees not to check or respond to work emails, calls, or texts during their breaks. Managers should be reminded to avoid contacting nonexempt employees during their lunch breaks to help to avoid situations where the employees answer calls or respond to messages when they should not be working.

There has been recent litigation on whether the employer is obligated to pay for missed meal breaks in instances where the employee fails to follow the employer’s procedure for reporting missed or interrupted meal periods. The outcome of this litigation is not consistent, which is why we recommend in the first instance that employees clock “in” and “out” for meal breaks to avoid the automatic deduction trap. If clocking in and out is not possible, then the employer must have a written policy advising employees that if their meal break is interrupted, they must fill out an “exception” report for that day. The exception form should be readily available to all employees. Further, employees should be required to sign off at the end of the week that their hours are accurate and that they did actually take an uninterrupted 30 minute meal break. Supervisors must be trained on this policy as well.

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**Mistake No. 2: Making Improper Deductions from Pay for Damage to Equipment, etc…**

With respect to nonexempt employees, an employer may not require an employee to pay for damage to an employer’s equipment if doing so reduces the employee’s pay below the statutory minimum wage or cuts into any part of the overtime compensation due to the employee and the amount so deducted must be included in determining an employee’s regular rate of pay. Stated another way, when deducting from a nonexempt employee’s pay for uniforms, tools, or damages incurred by the loss or destruction of company property, the employer should make certain that the nonexempt employee’s straight time pay after these types of deductions, when divided by the hours worked, is equal to at least minimum wage.[i] If the deduction cannot be made without going below minimum wage, the deduction must be made over the course of multiple paychecks in sufficiently small amounts to ensure the employee is earning at least minimum wage. If the employee’s employment is terminated before the entire amount is recovered, the employer’s recourse is to proceed in small claims court against the employee to recoup the funds. As a practical matter, however, it may not be cost-effective to do so.

For exempt employees, the DOL has stated that an employer policy that requires deductions from the salaries of its exempt employees to pay for the cost of lost or damaged tools or equipment issued to them would violate the salary basis requirement, thereby jeopardizing the exempt status of such individuals. This is true regardless of whether an employer makes periodic deductions from employee salaries, or requires employees to make out-of-pocket reimbursements from compensation already received.
Either approach would result in employees not receiving their predetermined salaries on a “guaranteed” basis and would produce impermissible reductions in salary, contrary to the applicable regulations. However, the DOL has said that the prohibition against improper deductions from the guaranteed salary does not extend to any additional compensation provided to exempt employees. Therefore, it is our opinion that deductions can be made from a salaried exempt employee’s commission payments without affecting the employee’s exempt status under section 13(a)(1) of the FLSA so long as the commission payments are bona fide and are not paid to facilitate otherwise prohibited deductions from the guaranteed salary. Finally, we caution that state law must also be referenced as many states such as Massachusetts, are much stricter about deductions from an employee’s pay.

**Mistake No. 3: “Booting Up and Shutting Down” — How to Properly Account for This Time**

A relatively new type of lawsuit under the FLSA relates to the time an employee spends waiting for his or her computer to boot up. Booting violations generally occur where the employee “clocks in” by signing on to the employer network, but cannot log-in for pay purposes until the computer has time to boot. For example, 2,645 customer service representatives working for Hilton Reservations Worldwide were awarded $715,000 in minimum wage and overtime pay when DOL investigators found that the company failed to pay employees for work performed prior to logging in such as booting up the computer, opening the program required to assist customers, and reading pertinent emails.

Under the continuous workday rule, the workday begins when an employee performs the first principal activity and ends with the last principal activity. If a “preliminary” or “postliminary” activity is integral and indispensable to a “principal” activity, it also is considered a “principal” activity, for which the employee is entitled to compensation. In general, preparing equipment necessary to perform a principal activity is considered a principal activity, and thus compensable work time. The regulations provide two examples of workers engaging in compensable work by preparing machines for use in principal activities: (1) the lathe operator who starts the workday oiling, greasing, or cleaning his machine or installing a new cutting tool; and (2) a garment worker who shows up 30 minutes before others to get machines ready for operation.

Several courts have found that the time spent logging into a computer, launching necessary programs, and shutting down a computer was integral and indispensable to that employee’s principal activities, and thus compensable. In fact, the Department of Labor has specifically stated that an example of the first principal activity of the day for agents/specialists/representatives working in call centers includes starting the computer to download work instructions, computer applications, and work-related emails. Some best practices to consider for avoiding “booting-up or shutting down” claims include:

- Consider allowing the employee to manually report hours, as opposed to starting the clock when employees login/out.
- Consider having a designated employee come in early and stay late to boot-up and shutdown employees’ computers.
Mistake No. 4: Misclassifying Employees Under the Administrative Exemption

The administrative exemption is perhaps the most difficult white-collar exemption to understand and correctly apply. Typically, the administrative exemption applies to higher-level operational personnel who are involved in the development of policies and business strategies in their area of responsibility. The administrative exemption is not intended to be a clerical exemption and does not generally apply to employees engaged in rote, manual, routine, recurrent and/or repetitive activities such as secretaries, data entry operators and bookkeepers.

The administrative employee’s primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers. Such primary duty may include tax, finance, accounting, auditing, quality control, purchasing, advertising, marketing research, safety, human resources, employee benefits, public relations, computer network, Internet and database administration, legal and regulatory compliance, and budgeting. The administrative employee’s primary duty must also include the exercise of discretion and independent judgment with regard to matters of significance. Typically, the exercise of independent judgment and discretion involves a comparison and evaluation of possible courses of action following an assessment of various possibilities as to matters of significance in either consequence or importance; it further implies that the person has the authority to make an independent choice that is free from immediate action or supervision. Exempt administrative work includes the formulation or interpretation of management policies; the provision of consultation or expert advice to management; recommendation of decisions that have a substantial impact on business operations or finances; analysis and recommendation of changes to operating practices; creation of business objectives plans; and the resolution of complaints, disputes and grievances. Notably, the fact that the employee’s job entails duties required to be performed by law does not necessarily mean that the job is an exempt position. For example, in *Desmond v. PNGI Charles Town Gaming LLC*, the fact that a casino was required by state law to employ a “Racing Official” did not affect whether the nature of the Racing Official’s duties made the position exempt.

As noted above, it can sometimes be difficult to apply the administrative exemption in particular factual circumstances. In DOL Opinion Letter FLSA2009-4, a city convention and visitor services sales manager was found to be an exempt administrative employee, as the employee’s duties were directed to the enhancement of the city’s image as a meeting place and, in turn, promotion of economic growth. Opinion Letter FLSA2009-4 stated that this employee’s research and selection of potential clients, design and creation of promotional materials, preparation and presentation of bids to potential clients, and determination of amenities and staffing to be offered constituted the exercise of substantial discretion and independent judgment regarding matters of significant economic impact to the city.

In determining whether an employee falls within the administrative exemption, it is important to examine the job duties actually performed by that individual, and not merely rely on a written job description. The individual should be performing duties that involve analyzing, interpreting, developing, evaluating, deciding and establishing. Duties that involve entering, inputting, tracking, maintaining, coordinating, monitoring,
In order to properly calculate the amount of overtime compensation an employee must be paid, the employer must ascertain that employee’s “regular rate of pay” for that workweek. An employee’s regular rate of pay is defined as “all remuneration for employment paid to, or on behalf of, the employee,” excluding certain specific types of payments as discussed below. Regardless of how an employee is paid, whether by the hour, by the piece, on a commission, or on a salary, the employee’s compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated. In general, all payments made to an employee for work performed should be included in the base calculation, unless specifically excluded by statute as noted below. The regular hourly rate of pay is determined by dividing the employee’s total remuneration for employment in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid.

Mistake No. 5: Not Including Bonuses in the Regular Rate of Pay

In order to properly calculate the amount of overtime compensation an employee must be paid, the employer must ascertain that employee’s “regular rate of pay” for that workweek. An employee’s regular rate of pay is defined as “all remuneration for employment paid to, or on behalf of, the employee,” excluding certain specific types of payments as discussed below. Regardless of how an employee is paid, whether by the hour, by the piece, on a commission, or on a salary, the employee’s compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated. In general, all payments made to an employee for work performed should be included in the base calculation, unless specifically excluded by statute as noted below. The regular hourly rate of pay is determined by dividing the employee’s total remuneration for employment in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid.

Payments Included in the Regular Rate

Bonuses and Premium Pay

The FLSA lists three types of premium pay that do not have to be included in calculating the regular rate, which are noted below. All other types of premium pay do not qualify for exclusion from the regular rate. These include extra pay for night shifts, hazard pay, extra pay for difficult or unpleasant work, and additional compensation offered as an incentive for quick work.

Nondiscretionary bonuses paid to employees based on the quantity of work (production bonuses) or quality of work must be included in the regular rate for the period in which the bonus is earned.

Commissions

Commissions are included in the total compensation paid to the employee for purposes of calculating the regular rate. All commissions must be included in the calculation of total wages paid regardless of whether the commission is the sole source of the employee’s compensation or is paid in addition to a guaranteed salary or on some other basis. Simply because the commission is paid on a basis other than weekly does not excuse the employer from including this payment in the employee’s regular rate for the time period in which it was earned. In addition, an employer may be required to adjust the amount of commissions included in the regular rate if it is aware that commissions may be shared or transferred between employees in the context of the employer’s business.

If a commission is paid on a weekly basis, the commission is added to the total of other wages earned, and the total is then divided by the total hours worked to arrive at the regular rate. However, if the commission...
amount cannot be ascertained by the regular payday, commission payments are excluded from the regular rate until they can be determined. In that case, an employee must be paid at least one and a half times the hourly rate, exclusive of the commission, for overtime hours. Once the commission is ascertained, it is apportioned back to each week in which it was earned. To do this, the regular rate for each workweek must be recalculated, and the employer must pay any additional overtime wages due.

When it is not possible or practicable to allocate commission payments over more than one work week, the DOL’s interpretative regulations set out two methods for calculating the regular rate with respect to commission payments in these circumstances. The first method allocates equal amounts to each week covered by the commission period. The second method allocates equal amounts to each hour worked. Under this method, commission payments that are unidentifiable with a particular week may be allocated to each hour worked when doing so is more reasonable and equitable. For this calculation, an employee’s commission should be divided by the number of hours worked within the commission payment period in order to determine the increase in the regular rate.

**Payments Excluded from the Regular Rate**

**Extra Compensation for Overtime Work**

Under Sections 7(e)(5) – (7) of the FLSA, the regular rate excludes extra compensation (premiums) paid by employers for specified types of overtime work. To qualify for the exclusion from the regular rate, the premium must be paid because work is performed outside of or in excess of contractually established daily or weekly work hours or because work is done on certain special days, such as holidays or weekends, and not for some other reason. These overtime premiums are unique because they are creditable toward overtime compensation due for work in excess of 40 hours per week.

Section 7(e)(5) excludes from the regular rate a premium paid for certain hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee, or in excess of the employee’s normal working hours. For example, if an employee normally works seven hours a day and 35 hours a week, any agreed upon premiums for work in excess of seven a day or 35 a week may lawfully be excluded from calculating the regular rate. Such amounts are creditable toward statutorily required overtime premiums.

Section 7(e)(6) excludes from the regular rate premiums paid for work by the employee on “Saturdays, Sundays, holidays, regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days.”

Section 7(e)(7) excludes from the regular rate “Clock Pattern” premium pay In order to qualify for the clock pattern exclusion, the premium must meet three criteria: (1) be paid pursuant to an employment contract or collective bargaining agreement; (2) be paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding 40 hours) and (3) equal or exceed “one and one-half times the rate established in good faith by
The FLSA permits employers to exclude discretionary bonuses from the regular rate. All other bonuses must be included in the regular rate calculation. In order to be considered discretionary, both the fact that payment is to be made and the amount of the payment must be determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. If an employer announces in advance that it will pay a bonus, it no longer has total discretion, and the payment cannot be excluded from the regular rate. It is important to note that a bonus program need not be written or formally established in order for it to be considered nondiscretionary. However, if an employer has a custom or practice of paying a bonus every year at the same time, this may suggest the existence of an understanding which might render the bonus nondiscretionary, thus includable in the regular rate. On the other hand, the fact that a bonus system is in writing does not, in and of itself, render it nondiscretionary where the written terms of the bonus plan clearly state that the granting of the bonus and the amount remain within the sole discretion of the employer.

Discretionary Bonuses, Prizes, and Awards
The FLSA permits employers to exclude discretionary bonuses from the regular rate. All other bonuses must be included in the regular rate calculation. In order to be considered discretionary, both the fact that payment is to be made and the amount of the payment must be determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. If an employer announces in advance that it will pay a bonus, it no longer has total discretion, and the payment cannot be excluded from the regular rate. It is important to note that a bonus program need not be written or formally established in order for it to be considered nondiscretionary. However, if an employer has a custom or practice of paying a bonus every year at the same time, this may suggest the existence of an understanding which might render the bonus nondiscretionary, thus includable in the regular rate. On the other hand, the fact that a bonus system is in writing does not, in and of itself, render it nondiscretionary where the written terms of the bonus plan clearly state that the granting of the bonus and the amount remain within the sole discretion of the employer.

Prizes, Gifts and Suggestion Systems
According to the DOL, in order to exclude a prize from the regular rate, the employer must show either that the prize was not paid to the employee for employment or that it was not a thing of value which is part of wages. A prize is considered additional remuneration when it is awarded based on some aspect of the employee’s work. In such cases, the amounts of such prizes, either in the form of cash or the value of the items awarded, must be allocated to the employee’s regular rate of pay. Even where the prize is not determined or funded by the employer, it must still be included in the regular rate where the payment is structured as a work incentive.

Gifts paid as a reward for service may be excluded from the regular rate if the amounts given “are not measured by or dependent on hours worked, production, or efficiency.” To be excluded, the employees must not have a legally enforceable contractual right to the gift. Holiday bonuses are an example of such gifts. While such bonuses may be paid annually and employees might come to expect the bonus, the FLSA specifically excludes such payments as gifts, so long as the amount is not so substantial that employees count on it as part of their wages or the amount is not tied to hours worked, productivity, or efficiency.

Profit Sharing or Trust and Thrift or Savings Plan Contributions
The regular rate does not include payments made by the employer to a profit sharing plan or trust, or a thrift or savings plan. To qualify for the exclusion, employer contribution payments must be made pursuant to a bona fide plan. The Department of Labor has adopted regulations that set forth the minimum requirements that a “bona fide thrift or savings plan” and a “bona fide profit-sharing plan or trust” must meet in order for employer contributions to be excluded from the regular rate. The regulations can be found at 29 C.F.R. § 547 and 29 C.F.R. § 549.
Stock Option Grants
Income derived from a stock purchase plan may be excluded from a nonexempt employee’s regular rate so long as (a) the plan requires that employees hold their stock options for at least six months before cashing them in; (b) the plan requires that the option price be at least 85 percent of the market price when the option is granted; (c) employee participation in the plan is voluntary; and (d) the terms of the plan are disclosed to the employees.

Benefit Plan Payments
The regular rate excludes contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. Benefit plans must meet certain minimum Department of Labor standards in order for the contributions to qualify for the exclusion from the regular rate. Benefit payments from the employer directly to the employee do not qualify for the exclusion. Cafeteria plans raise special exclusion issues. The Department of Labor’s interpretive regulations set forth certain criteria under which the contributions may be excluded from the regular rate of pay. The regulations can be found at 29 C.F.R. § 778.215.

Payments Made When No Work Is Performed
When an employer pays an employee for time he or she is not at work, the compensation may be excluded from an employee’s regular rate. As such, employers are not required to count payments made for holidays, paid leave or vacations in calculating the regular rate. If an employee works on a day he or she could have taken as a paid holiday, the hours worked and pay received are counted as any other hours worked and should be included in the regular rate. If, however, the employee also receives holiday pay in addition to pay for the work actually performed on the holiday, the holiday pay may be excluded when calculating the regular rate.

Reimbursement of Employee Expenses
The regular rate excludes reimbursements made by the employer to the employee for the actual or reasonably approximate amount of expenses incurred by an employee in the furtherance of his employer’s interests. Some examples of reimbursements that are excludable include away-from-home travel expenses and meals. On the other hand, payments for expenses that are personal to the employee and incurred for his or her own benefit, such as expenses for traveling to and from work and buying lunch, must be included in the regular rate.

Other Similar Payments
Other similar payments to an employee which are not made as compensation for his hours of employment may also be excluded. “Show-up” and “call-back” pay qualify for this exclusion. Show-up pay is a minimum amount of pay an employee receives for showing up at work on a regularly scheduled workday even when the employer is unable to provide the employee a full day’s work. Call-back pay provides a minimum amount of pay for an employee who is called back to work after his or her scheduled work hours. The Department of Labor provides examples of “other payments” for hours not worked that can lawfully be excluded in 29 C.F.R. § 778.
Talent Fees
Talent fees paid to performers and announcers on radio and television programs may be excluded from the regular rate. Talent fees are extra payments made for special services beyond the scope of the performers’ regular duties on particular sustaining programs.

Mistake No. 6: Improperly Using Unpaid Interns
The FLSA defines the term “employ” very broadly as including to “suffer or permit to work.” Individuals who are “suffered or permitted” to work must be compensated under the law for the services they perform for an employer. Recently, the issue of whether an intern is an employee under the FLSA has garnered a lot of attention and been the subject of several legal challenges. In the “for-profit” private sector, interns are viewed with an especially critical eye. Accordingly to the Department of Labor, there are certain circumstances under which individuals who participate in “for-profit” private sector internships or training programs may do so without compensation. There are six criteria that must be present under the DOL analysis for the individual to be an unpaid intern versus an employee:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an education environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and, on occasion, its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all six factors are met, the DOL does not consider it to be an employment relationship under the FLSA and the intern does not need to be paid.

Several courts have recently examined the issue of internships and apply factors which vary slightly from the six criteria outlined by the DOL. For example, the Fourth and Sixth Circuits apply a primary benefit test. The Sixth Circuit summarizes this test as an analysis of “which party derives the primary benefit from the relationship…[f]actors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations that can guide the inquiry.” The Fifth Circuit also applies a primary benefit test, but in conjunction with the six-factor test.

The Tenth Circuit applies the totality of the circumstances test. This test uses the six-factor test, but does not require that all of the factors to be met. The Eleventh Circuit applies the economic realities test, which includes a consideration of whether the work conferred an economic benefit on the entity or whether the interns worked for their own advantage or personal purpose, together with the DOL’s six-factor test.
The six-factor test is the most rigid of those mentioned above because it requires that the internship meet every single factor in order to be excluded from the FLSA’s minimum wage and overtime requirements. Generally, if an employer is able to meet the six-factor test, the other tests will be met as well. Therefore, in light of recent attention regarding unpaid internships, employers that wish to minimize their exposure to potential liability for FLSA and state minimum wage violations may wish to err on the side of caution and ensure the six-factor test is met before advertising for and hiring an unpaid intern.

Mistake No. 7: Not Paying for Work Performed Remotely

In light of the widespread use of mobile devices, employers must carefully determine whether they are capturing all time worked by nonexempt employees with such devices. This is an area of increasing concern, since mobile devices are often used to send and receive work related emails. The time spent by nonexempt employees using such devices for work related tasks may need to be included as time worked. Employers are not responsible for paying for de minimis amounts of time in certain situations (sometimes referred to as the “de minimis” rule). This rule, however, only applies in situations where (1) it is administratively impractical to record the additional time; (2) the amount of aggregate time is insignificant; and (3) the addition time is not regularly occurring. Today’s intricate modern devices often permit employers to determine the time spent on a call, tweet or email. As such, a nonexempt employee who spends a minute or two responding to an email after or before their actual work hours may need to be compensated for such time. This is particularly true now that the Department of Labor has developed an application for iPhones and iPads that provides employees with an easy way to track their hours of work.

Employers should also be aware that if an employee receives an email with work instructions while the employee is at home, and the time spent reviewing and/or responding to the email is more than de minimis, the employer must pay that employee for that time. This is of particular concern if an employee is using a mobile device to receive work instructions at the beginning of the day before commuting to work. While time spent commuting to work is ordinarily not compensable, if an employee performs a principal activity at home in response to an email with work instructions, the commute time may be compensable. One court in Massachusetts found that an employee who spent time at home responding to emails began his work day and thus his commute time was compensable. Another court in California found that time spent at home reviewing emails and getting directions to his first stop were not principal activities and thus the commute was not compensable.

The Massachusetts case is most instructive. In Dooley v. Liberty Mut. Ins. Co., employees who worked as automobile damage appraisers brought a collective action under the FLSA against their employer seeking unpaid overtime compensation for travel and other time that they spent working and driving to and from appraisal sites from their homes. The plaintiffs alleged that they started laptops, checked email and voice mail, responded to messages, reviewed the day’s assignments and those for the following day, electronically sent appraisals and photographs to their employer, and made work-related phone calls at the beginning and ending of their regular work days from their homes. These tasks were part of the employees’ regular work, and they alleged that they began and ended each workday by performing such tasks. The court therefore
 held that the commuting time that the employees spent driving from home to the first appraisal site at the beginning of day and from the last appraisal site at the end of day to their home was compensable under the FLSA for those employees who began their workday by performing work at home.

In order to control the impact of mobile devices on nonexempt employees’ work time, employers should develop written policies that prevent and/or prohibit nonexempt employees from using mobile devices during non-working hours and require nonexempt employees to report any time spent using such devices. In addition, employers should not give nonexempt employees remote access to email. If this cannot be avoided, managers should be instructed not to email nonexempt employees during off hours.

For exempt employees, mobile access can also cause FLSA concerns. If an exempt employee is out for a full day absence not compensable under the FLSA, the employer can run into a problem if the exempt employee performs work remotely. Since the employer cannot deduct from an exempt employee’s salary for a partial day absence, an employer may have to pay the exempt employee for the absence if more than de minimis work is performed. Because of this risk, employers should have a policy preventing exempt employees from performing work on the cell phone or other device when out for a full day which is not being compensated.

**Mistake No. 8: Making Improper Deductions from Exempt Employees’ Salaries**

To be exempt, an employee must be paid on a salary basis. That is, the employee must regularly receive a predetermined salary on a weekly or biweekly basis. The DOL has set forth certain deductions from this predetermined salary which will not destroy the salary basis. All other deductions are not permitted under the salary basis test.

**Improper Deductions**

**Partial Day Absences**

In general, private sector employers may not make salary deductions for absences of less than one full day without defeating the salary basis test and causing substantial overtime liability for otherwise exempt staff. Significantly, a pay system that subjects exempt employees to partial day salary deductions may destroy the salary status, even if no actual deductions are made. If an employer has a policy that, when applied, would lead to an improper deduction from a salaried employee’s pay because of a partial day absence, the exemption may be lost even if the policy is not actually applied to the employer’s salaried workers. Employers should avoid policies that result in a salary deduction for partial day absences of salaried, exempt employees, as well as practices or policies under which there is a significant likelihood of such a deduction occurring.
NOTE: The revised 2004 white-collar regulations continue to contain a provision providing that public employers may dock employees’ pay in increments of less than a day without the employees being considered nonsalaried so long as the deductions are done pursuant to principles of public accountability.

Notably, both public and private sector employers may charge partial day absences against accrued leave benefits without destroying an employee’s exempt status. Additionally, as set forth below, deductions from salary for intermittent or reduced schedule leave under the Family and Medical Leave Act (FMLA) are permissible by both private and public sector employers.

**Deductions for Jury Duty, Attendance as a Witness, or Temporary Military Leave**

Employers may not make pay deductions for absences due to jury duty, attendance as a witness, or temporary military leave. However, an employer is permitted to offset payments an employee receives for such services against regular salary during the week of such an absence. For example, if an employee receives a $50.00 fee for jury duty for three (3) days, the employer may reduce the employee’s salary by $50.00 for the week of jury duty without destroying the employee’s exempt status or otherwise violating the FLSA.

**Permissible Deductions**

**During Initial and Terminal Weeks of Employment**

Although exempt employees must usually be paid for an entire week if the employee worked any portion of that week, during the initial or terminal weeks of employment, an employer may pay a proportionate part of the employee’s salary for the time actually worked. However, this does not mean that, if an employee is employed occasionally and is paid a proportionate part of the weekly salary when so employed, that he or she is paid on a salary basis. Casual or occasional employment for a few days at a time has been viewed as inconsistent with employment on a salary basis.

**When the Employee Is Absent from Work for a Day or More for Personal Reasons Other than Sickness or Accident**

An employer may make deductions from an employee’s salary when the employee is absent for one or more full days for personal reasons, other than sickness or accident. Thus, an exempt employee’s pay may be docked if he or she misses an entire day’s work in order to handle personal affairs, and the employee’s exempt status will not be affected.

**When the Employee Is Absent from Work for a Day or More Due to Sickness or Disability**

When compensable leave time under a bona fide plan, policy, or practice has been exhausted, an employer may deduct from an exempt employee’s weekly salary for absences caused by sickness or disability of one or more full days. Such a deduction may be made before an employee has qualified under the plan, policy or practice.
When the Deduction Constitutes a Penalty Imposed in Good Faith for an Infraction of a Safety Rule of Major Significance

According to the Wage and Hour Division, a deduction for a penalty imposed in good faith for infractions of safety rules of major significance is permissible. An example of such a rule includes one prohibiting smoking in explosive plants, oil refineries, or coal mines. Employers may also suspend employees without pay for violating a workplace conduct rule, but any such suspension must be for one or more full days. The reasons for the above deductions from pay should be referenced in a written policy.

Where a Salaried Employee Takes Intermittent or Reduced Schedule Leave Under the Family and Medical Leave Act

The Family and Medical Leave Act regulations provide that an employer may make deductions from an employee’s salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains required records regarding FMLA leave will not be relevant to the determination of whether an employee is exempt under the Fair Labor Standards Act.

For an employee paid in accordance with the fluctuating workweek method of payment for overtime, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, the employer may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee’s regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly with respect to all employees paid on a fluctuating workweek basis for which FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer elects not to convert the employee’s compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced schedule leave is over, the employee may be restored to payment on a fluctuating workweek basis.

Safe Harbor

Generally, isolated and inadvertent improper deductions from an exempt employee’s salary will not result in a loss of the applicable exemption, IF the employer reimburses the employer for such deduction. Also the DOL adopted a “safe harbor” provision whereby an employer may preserve the exemption by clearly communicating a policy to its employees prohibiting such deductions and providing for a complaint procedure. The protections afforded by the safe harbor are lost if the employer willfully violates the policy by continuing to make improper deductions after a complaint has been received. Likewise, the “safe harbor” is lost during the time of improper deductions for all employees in the same job class as the affected individual who work under the same manager responsible for the actual improper deductions.
TOP 10 FLSA MISTAKES

Exempt Salaried Employees and the Paid Time Off Bank

With regard to paid time off banks, the key issue is what happens to the exempt employees’ salary when all paid time off has been exhausted. According to Opinion Letter FLSA 2009-18, an employer who requires exempt employees to take PTO during periods of low work availability such that the exempt employee works less than a full work week, must be paid his or her full salary if there are no PTO hours available, the PTO balance is already negative, or the use of PTO will result in a negative balance. See also DOL Opinion Letter FLSA2009-2 (employer’s requirement that exempt employees use accrued vacation time for plant shutdown period does not affect their exempt status if they receive payment in an amount equal to their guaranteed salary during any weeks in question).

Mistake No. 9: Misclassifying Employees as Independent Contractors

Employees as defined by the FLSA are entitled to protection by that law. The FLSA does not cover independent contractors. For this reason, it is extremely important to properly designate persons as employees or independent contractors. In deciding whether an individual is an employee under the FLSA or an independent contractor, the label placed on the individual and any signed contract are not going to be determinative. The test used under the FLSA is the “economic realities” test, which requires courts to examine the totality of the circumstances in determining the economic reality of the relationship. In United States v. Silk (1947), the United States Supreme Court identified the following factors to be relevant considerations in determining employee status:

1. Degree of control;
2. Investment in facilities, tools, equipment;
3. Opportunity for profit and loss;
4. Permanency of the relationship;
5. Required skill; and
6. Whether the services rendered are an integral part of the company’s business.

In making the determination, the degree of control continues to be a major component of the analysis.

It is very important for companies to review independent contractor status on a regular basis, and not to assume that previous analyses of the situation were correct. Improperly designating an employee as an independent contractor will have far reaching consequences, including potential problems in the following areas: minimum wage and overtime; failure to offer benefits under ERISA; unemployment and payroll tax obligations; social security and federal tax contributions; and workers compensation insurance.
TOP 10 FLSA MISTAKES

Mistake No. 10: Not Auditing Your Pay Practices

Auditing your pay practices is a very good way to assess whether you are compliant with FLSA statutory requirements and DOL regulations. For example, some of your compensatory practices may have changed over time and these changes can lead to problems. A new bonus may have been implemented by management and the amount of this bonus may not have been accounted for in the regular rate of pay. Additionally, changes in job duties performed by exempt employees may have so evolved that the employee is no longer exempt under the white collar exemptions. These types of issues should be reviewed as part of an audit. However, a cautionary note should be made here. If, as a result of an audit, you discover violations of the federal or state wage and hour laws, you must commit to fixing these problems or you expose your company to a willful violation in subsequent litigation. Also, if the audit is not protected by an attorney client privilege, its results may be obtained in a discovery request in subsequent litigation. To protect yourself you should contact an attorney before beginning the auditing process.

Conclusion

Due to the vast number of wage and hour claims made each year, every employer should examine its workplace rules, policies and procedures to avoid these top 10 FLSA mistakes. Failure to do so could lead to a costly lawsuit or DOL investigation. In this case, an ounce of prevention is worth a pound of cure.

[i] In limited circumstances, deductions for shortages due to theft or misappropriation of funds may be permissible, even if it reduces an employee’s wages below the statutory minimum. However, it is recommended that employers seek guidance in such situations to ensure compliance with all applicable regulations.

This report is provided with the understanding that we cannot provide a wide audience with specific legal, technical, or other professional service or advice relating to hiring employees versus independent contractors. Additional information relating to this topic is available in the ThinkHR compliance library and from our ThinkHR Live Hotline advisors.