

## So You Think You Know About the FLSA? Ten Common Assumptions About the FLSA That Can Land You in Hot Water

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Most employers have at least a general idea of the requirements of the Fair Labor Standards Act (the "FLSA"). It establishes a federal minimum hourly wage that generally must be paid to covered employees<sup>1</sup> and may also require payment of "premium" overtime compensation to covered employees who work more than 40 hours in a workweek<sup>2</sup>. Whether through overtime or straight time, the FLSA requires that employers compensate their employees for all hours "suffered or permitted" to work.<sup>3</sup> Some employees, however, may be classified as "exempt" from these requirements under the law. The requirements for each exemption are set forth in the FLSA and/or in the DOL regulations.

While this all sounds simple enough, the road to FLSA compliance is riddled with pitfalls for the unwary. For instance, in today's workforce, the issue of when the compensable workday starts and ends has become more complicated with the widespread use of computers and other mobile technology, including technology that lets workers extend their workday beyond their time at the office. And in some industries, particularly involving high-tech fields, employers are finding difficulties classifying positions that were non-existent or not prevalent in the not-so-distant past.

I wish I could say that it only takes a certain level of common sense to comply with the FLSA. Unfortunately, relying on common sense alone does seem to get some employers in hot water – at least when it comes to wage and hour law. Sometimes, employers even get in trouble for trying to accommodate their employees. As Daniel Abrahams, a partner at the law firm of Brown Rudnick LLP likes to say, "When it comes to FLSA compliance, no good deed goes unpunished." And, many wage and hour practitioners hear about all kinds of misunderstandings about the FLSA, many of which will undoubtedly be repeated by unsuspecting employers. It would be impossible to anticipate all the varying circumstances an employer may face, but this article attempts to highlight a few of the most common mistakes (in no particular order) that have been observed by some long-time practitioners in the field.

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*Mistake # 1. Assuming that you don't have to pay employees for clocking in early or late simply because the time is outside of their scheduled work hours.*

Some employers mistakenly believe that just because they dictate the start and stop times of an employee's schedule, they don't have to pay an employee who clocks in early or clocks out late. Depending on your facts, this practice may violate the FLSA. An employer cannot dock an hourly employee's pay merely because the employee began working before his or her shift began or after his or her shift ended. Nonexempt employees must be paid for all time suffered or permitted to work. If you have a policy against clocking in early or late, you should discipline employees who violate the policy, but must still record and pay the employee for the time actually worked.

It is worth noting that time spent performing activities prior to or after a shift may not always be considered compensable working time.<sup>4</sup> The Portal-to-Portal Act amended the FLSA to exclude time spent performing certain activities that are considered "preliminary or postliminary" to the employee's main job duties from compensable working time.<sup>5</sup> This is a highly fact specific analysis, but depending on the nature of the work, may exclude from working time activities such as donning or doffing uniforms, standing in line to punch in, or standing in line at security.

*Mistake # 2. Assuming that because an employee "volunteers" to finish a project, you do not have to compensate them those hours worked.*

One of your most dedicated employees, Janine, only cares about getting the job done and will volunteer her time after work to complete the project. Janine's sacrifice is admirable, but you must pay her for that time despite the characterization that her time was "volunteered." Even though a non-exempt employee might be willing to "volunteer" time to finish a project, the FLSA requires that employee be paid for that time because he or she is being suffered or permitted to work for the benefit of the employer.<sup>6</sup> And if Janine's work is in addition to her 40-hour workweek, she was entitled to overtime pay under the FLSA.

If you don't intend to pay an employee for the overtime work, you must instruct the employee not to work overtime. If necessary, you must enforce that instruction and take steps to discipline employees who work unauthorized overtime.<sup>7</sup> But you must pay for the work!

*Mistake # 3. Assuming that because your company has a policy against working from home, you don't have to pay employees who violate the policy.*

Suppose an employee emails you a project from his or her personal email on his or her normal day off. In that case, you are constructively on notice that that employee might have worked from home. Even if you have a company policy that prohibits working from home, that work might be compensable.<sup>8</sup> An employer must pay for all time suffered or permitted to work that the employer knew or should have known was being done.

If you have a policy against working from home, you must properly train your supervisors and employees. You may choose to pay an employee who violated the policy, but you should discipline him or her for the violation. Such discipline can include withholding discretionary bonuses, raises and promotions, but it cannot involve deductions from wages. If you, as an employer, insist on not paying for those hours because it was against company policy, then you should also not accept the benefits of his or her work.

Employers should also be sensitive to the reasons employees are taking work home. Supervisors who are motivated to "just get the job done" may actually be the cause of violations of an employer's policy of no off-the-clock work by pressuring employees to meet unreasonable deadlines. One way to reduce the risk of liability here is to analyze how much time is typically required to complete a task for different experience levels and ensure that work is divided and deadlines set accordingly.

*Mistake # 4. Assuming you don't have to pay wages for inefficient work.*

An employee must be paid for all hours he or she is suffered or permitted to work, even if you find the employee is inefficient in performing his or her work. You cannot argue that you did not benefit from the inefficient work and you cannot ask the employee to work "off-the-clock" to make up for his or her lack of productivity, but may choose to otherwise discipline your employee.

*Mistake # 5. Assuming that when you interrupt an employee's lunch for work, you don't have to pay for that time.*

You may have heard or even thought this before "My assistant will offer to type something up for me during her lunch break because she's already eating at her desk." Yes, this may seem harmless, and heck – it may seem like she is "volunteering" this time – but this practice can actually recharacterize a lunch period into working time. And if this is in addition to 40 hours of work, you may owe her an overtime premium. Remember, the general rule for nonexempt employees is they must be paid for all time suffered or permitted to work. A meal period of ordinarily one-half hour or more is generally non-compensable when the employee is completely relieved of duties.<sup>9</sup> But if you ask an employee to work part of his or her meal period, even just answering the phones, then the entire time may become compensable working time.

For unsuspecting employers, this practice may create unexpected results and, therefore, employers should pay careful attention when allowing employees to perform any duties during their lunch break.

*Mistake # 6. Assuming you only have to pay your employees for time after they "clock in."*

Some employers may require employees "clock in" to a software program on their computer at the beginning of their shift. This has caused some practitioners to ask whether under the FLSA, you are required to pay employees for time spent waiting

to boot up their computers. This issue is currently being battled over in the courts. And the practical answer is, well...it depends on the facts. For many call-center environments, employees must be ready to work (*i.e.*, have phones and the computer system up and running) at the beginning of their shift. This may involve completing certain tasks, such as booting up a computer, in advance of that ostensible start of the work day. Whether you must pay for the time it takes to boot up a computer may depend on a variety of facts. Is the act of booting up the computer "integral and indispensable" to that employee's principal activities – the tasks an employee is employed to perform? If so, the time spent booting up may be considered compensable working time. Also, what does the employee do while the computer is booting up? If he or she goes and gets a cup of coffee, or runs a personal errand, then the time to boot up is less likely to be considered compensable working time. If the employee proceeds to perform other work-related tasks, then it could be considered compensable working time.

Employers can avoid potential litigation by requiring employees boot up only after the start of their work shift. Employers should also evaluate their policies for defining work time that involves booting up.

*Mistake # 7. Assuming that time spent checking email on a Blackberries<sup>®</sup> or iPhone<sup>®</sup> is not "work."*

Indeed, there are many technological tools that provide employees with added convenience and mobility, but the reality is this can complicate calculating the number of hours an employee is suffered or permitted to work. Depending on the facts, *i.e.*, if the time is more than *de minimis*, time outside the workplace checking email on a Blackberry<sup>®</sup> may count towards hours worked. These types of FLSA claims often are not raised until after the work has already been done and usually only after the employee has been fired or otherwise disgruntled. Therefore, employers who have a policy against working from home may find it difficult prevent this work and enforce their policy. Nonetheless, employees will not always be entitled to payment for work done at home and employers can reduce their potential liability by watching for signs that employees are working at home or outside of the office on their own time. But don't forget the general rule – nonexempt employees must be paid for all hours that they are suffered or permitted to work.

*Mistake # 8. Assuming that your employees are exempt from overtime simply because you pay them well.*

This is a common mistake when classifying employees. Just because you pay an employee more than the market rate does not make the employee exempt from the FLSA. And even for employees who make more than \$100,000 a year, the employee's duties must meet the requirements for the exemption.<sup>10</sup>

Similarly, some employers think that their employees must be exempt because the employee's work is invaluable to the business. Just because you value his or her work does not make the employee exempt from the FLSA. Whether an employee exercises discretion and independent judgment regarding matters of major significance is part of the test for the administrative exemption – not whether you consider the work important.

*Mistake # 9. Assuming that common practices across many companies do not violate the FLSA.*

On any given day, you can find an article about some gigantic settlement or judgment against an employer who probably followed the example of others in their industry. Following your industry peers is no defense to liability under the wage and hour laws. In fact, when plaintiffs' lawyers and DOL investigators catch on to a widespread practice that violates the FLSA, they will be more likely to target your company at the same time they target others committing the same violation. It is a bad idea to assume you are safe simply because you are following the example of others.

*Mistake # 10. Assuming you are better off saving money and not obtaining legal counsel for your FLSA questions.*

Not everyone likes talking with (or paying) lawyers, but you may actually save money in the long run if you talk to a lawyer about your exempt and non-exempt classifications. As this article points out, a lawyer may have experience with your particular issue and can help you resolve your problem more efficiently than you can. Indeed, the application of the FLSA can be highly fact specific – and what may be entirely proper for one particular employee may be considered a violation for another. A lawyer can also tell you what employment policies have met with approval by the courts or the Department of Labor. But lawyers not only help you prevent violations, there is another benefit to relying on counsel. Courts will consider whether an employer made a good faith effort to ascertain what the law requires, and if so, the employer has a good faith defense to liquidated (*i.e.*, double) damages under the FLSA. That is generally understood to require consultation with a lawyer. As they say, "An ounce of prevention is worth a pound of cure."

#### *Conclusion*

This is but a small sample of the mistakes employers have made when trying to comply with the FLSA. If you find you have fallen victim to any of these pitfalls, rest assured, you are not alone but you should immediately seek counsel to mitigate your liability to the extent possible. But it is the hope of this author that this article will help some learn from the mistakes of others before violations occur.

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<sup>1</sup> 29 U.S.C. § 206.

<sup>2</sup> 29 U.S.C. § 207.

<sup>3</sup> See 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time.").

<sup>4</sup> See, *e.g.*, 29 C.F.R. § 785.48 (stating that early or late time clock punching may be disregarded provided no work was performed during the relevant periods).

<sup>5</sup> See 29 U.S.C. § 251, *et. seq.*; see also 29 C.F.R. § 785.9.

<sup>6</sup> See 29 C.F.R. § 785.11 ("For example, an employee may voluntarily continue to work at the end of the shift....The reason is immaterial. The employer knows or has reason to believe that he is continuing to work an the time is considered working time.").

<sup>7</sup> 29 C.F.R. § 785.13 states:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The merely promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

<sup>8</sup> See 29 C.F.R. § 785.11; see also 29 C.F.R § 785.12 ("The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.")

<sup>9</sup> See 29 C.F.R. § 785.19 ("Bona fide meal periods are not worktime....The employee must be completely relieved of duty...The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk...is working while eating.").

<sup>10</sup> See 29 C.F.R. § 541.601.