



Are you entitled to overtime pay?

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record-keeping and youth employment standards for workers in the private sector and government. Covered non-exempt workers are entitled to the following:

- Minimum wage of at least \$7.25 per hour
- Overtime pay of at least 1.5 times regular pay if they work more than 40 hours per week.

An Employee can collect a judgment from an employer for un-paid overtime in the following situations:

1. *Misclassification of a worker's position*

There are three “white collar” exemptions to overtime pay: serving in a bona fide “executive,” “administrator” or a “professional” capacity. Simply calling an employee’s position “executive” or an “administrator” does not establish exempt status unless the “primary duty” of the position is to perform certain white collar administrative or executive functions. **FLSA exemptions are always defined by what you do, not what you are called.**

The law sets out a list of factors to help determine whether an employee’s primary duty is the performance of exempt work. Considerations include the relative importance of exempt duties; the amount of time spent performing exempt work; an employee's freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees. Misclassification often occurs in retail chains where the “manager” spends the majority of his work time performing non-exempt work – unloading trucks, stocking shelves and waiting on customers. Although the “manager” may spend an hour or so each day filling out forms, the real “management” of the store is handled at corporate headquarters. Courts often find that these “managers” are actually non-exempt employees who are entitled to the overtime provisions of the FLSA.

2. *Salaried employees*

Some employers tell their employees that they do not receive overtime because they are paid a salary. This is widely held misconception about the FLSA. **FLSA exemptions are always defined by what you do, not how you are paid.** Employees who receive a salary may still be covered the FLSA overtime pay requirements. We have seen many examples of non-exempt salaried employees who were entitled to overtime pay under the FLSA.

3. *Compensatory time*

Employers sometimes offer employees “comp time” (i.e., paid time off in a future work week) in lieu of overtime pay. This is another widely held misconception. Under the law, only government employers can offer comp time -- and then only under a narrow range of circumstances. It is illegal for private employers to offer comp time to in lieu of overtime pay to non-exempt employees.

4. *Workweek expansion*

For most employers, the FLSA overtime rules operate on the basis of a seven-day workweek. If you work more than 40 hours in a seven-day workweek, you’re entitled to overtime pay for that week, regardless of the dimension of the actual pay period. If your employer pays you on the basis of a 14-day pay period, for example, the employer may not “average out” the employee’s work time for purposes of paying overtime. If you worked 50 hours in the first week and 30 hours in the second week of a 14-day pay period, you are entitled to 10 hours of overtime pay for the first week.

5. *Undocumented workers*

Anyone who performs non-exempt work is covered by the FLSA. Many employers in Atlanta hire undocumented workers (e.g., as dishwashers, cooks, maids, landscapers, fabricators, etc.) and fail to pay them the FLSA minimum wage, overtime or both. The courts are not hesitant to require employers to pay undocumented workers according to the FLSA. We have successfully pursued dozens of minimum wage and overtime cases for undocumented workers.

6. *Waiver*

Sometimes employers require workers to sign a document waiving their right to overtime pay. These waivers are, in reality, toothless. Under the law, FLSA rights *cannot* be effectively waived without the express prior approval of a federal court.

7. ***Working “off the clock”***

Employers sometimes try to avoid paying overtime by forcing employees to clock out but continue to work. In a recent case, an employer kept “card time” up to 40 hours for each employee and “paper time” for work time over 40 hours and then unlawfully paid the employees at their regular rate for the paper time. Sometimes employers insist they cannot pay overtime but thank employees profusely for working for free. This, too, is a violation of the law.

8. ***Incomplete records***

Employers may try to avoid paying overtime due to incomplete records. The FLSA requires employers to “make, keep and preserve records” of employees and of their “wages, hours, and other conditions and practices of employment” – this applies to exempt and nonexempt workers. For non-exempt employees, records must include the hours worked each day and week; these records must be preserved for three years. An employer’s failure to create and maintain legally required records has a legal consequence: the employee’s reasonable approximation of his work time will be the best evidence of that work time.

9. ***Independent contractors***

Employees are entitled to overtime pay; independent contractors are not. Employers often label a worker as an independent contractor to avoid paying overtime under the FLSA. As with white collar exemptions, **FLSA exemptions are always defined by what you do, not what you are called.** The most important factor in an independent contractor/employee analysis is the amount of control that the employer exercises over the worker.

10. ***Multiple Employers***

As a general rule, companies with annual earnings of \$500,000-plus are subject to the FLSA. Employers that operate with multiple corporate identities may try to avoid the FLSA by appearing to be a set of smaller companies. Sometimes an employer may pay employees from more than one account so that no one paystub shows more than 40 hours a week. However, the law sets out criteria for when multiple corporations will be considered a single employer under the FLSA (related activities, unified operations or common control, and a common business purpose). In a recent case, the employer had two corporations, one for his landscaping business and one for his landscape lighting business. The two companies had sufficient connections to be considered a single employer under the FLSA.

11. ***Manipulation of the Tip Credit***

Employers of waiters, bartenders, busboys and other traditionally tipped employees are governed by a niche in the law called the tip credit, which allows the employer to reduce the minimum hourly wage paid to these employees by \$5.12 per hour. This results in an effective

hourly wage of \$2.13 (i.e., $\$7.25 - 5.12 = \2.13). Employers sometimes require that the tipped employees participate in a “tip pool”. A tip pool defeats the tip credit (resulting in a \$7.25 per hour minimum wage) under the following conditions:

- a) If the tip pool is paid to an employee who is not traditionally tipped (for example, dishwashers, janitors, chefs, washroom attendants, managers).
- b) If an employer takes anything out of an employee’s tips other than a lawful tip pool.

If either of the above occurs, the employer is liable to the employee for the value of the tip credit (\$5.12 per hour), a like amount as liquidated damages, and the employee’s attorneys’ fees.

Sometimes employers use the tip credit to pay overtime hours. Overtime at the minimum wage is \$10.88 ($\7.25×1.5). For tipped employees, the correct overtime rate is \$5.76 (i.e., $10.88 - 5.12$). Many employers mistakenly inflate the tip credit to \$7.68. (i.e., 5.12×1.5) resulting in the incorrect overtime rate of \$3.20. This, too, can be a very costly mistake for an employer.

12. *Commission-Only Pay Plans*

Sales employees, mortgage brokers and other employees often work on a commission-only pay formula. If you make no sales in a week; you will make no money. Employers who pay on this basis risk FLSA exposure if a commissioned employee (other than an “outside salesperson”) earns less than \$7.25 for each hour worked in any given week or if the commissioned employee works more than 40 hours in a week. **FLSA exemptions are always defined by what you do, not how you are paid.**

If you are an employer or an employee and have questions about the Fair Labor Standards Act, call the FLSA experts at DeLong Caldwell Bridgers & Fitzpatrick, LLC, Charles Bridgers and Kevin Fitzpatrick, at (404) 979-3150 for a free consultation. For more information, check out our website at www.dcbflegal.com.



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