



“I SEE WORKING PEOPLE”
... Now What Should[n't] *I* Do?

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Payroll Professional?

- Different from Human Resources (HR).
- Just as important
 - to ensuring your company does not violate local, state, & federal wage and hour laws.
 - Because Payroll Records help win or lose cases.



Purpose

➤ 3 GOALS

Payroll Compliance

- ✓ Explore Laws Regulating Payroll

Practices to Avoid.

Tips to Implement Now.

- ✓ Produce Accurate Paychecks



I Should . . .

- ✓ *Know . . .*
- ✓ *Learn . . .*
- ✓ *Follow . . .*
- ✓ *Update myself on. . .*



The Law

Why Should I . . . ?

Because **YOU** may be **at risk!!**

- **Targeted Employers**

Industries that rely on “*redefined employment relationships*” including “*subcontracting; third-party management; franchising; independent contracting . . .*” - DOL’s Strategic Plan for Fiscal Years 2011-2016

E.g., “agricultural , *construction, janitorial, and hotel/motel industries.”

Why Should I . . . ?

Because **YOU** may be **at risk!!** (cont.)

➤ **All Employers**

- Careless;
- Well-Intentioned;
- Most Conscientious;
- Private or Government.
 - Apr. 12, 2013 - \$35 million agreement by Commonwealth of Puerto Rico to pay back wages & interest to 4,490 current & former employees.

➤ **Supervisors, Individuals?**

Why Should I . . . ?

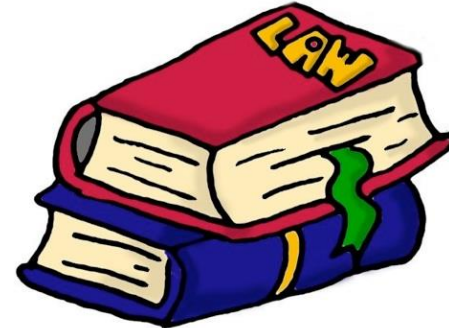
- Ignorance of the Law is NO excuse



- MORE Laws: Not just federal (*e.g.*, FLSA).

Wage & Hour Protection Laws

- ❑ Fair Labor Standards Act (FLSA)
- ❑ National Labor Relations Act (NLRA)
- ❑ State/Local “Wage Theft” laws/ordinances
 - Penal Code (criminal) penalties



Why Should I . . . ?

Violate Wage & Hour laws

→ **BIG**



Problems.

Why Should I . . . ?



- **Department of Labor**
 - “Bridge to Justice”



- **Internal Revenue Service**
 - “Voluntary Classification Settlement Program”

Why Should I . . . ?

HIGH Stakes:

- Collective Actions
- Back Wages,
Liquidated Damages,
Interest, & Employee's
Atty's Fees
- Bankruptcy



Why Should I . . . ?

Quarter Billion Dollars



➤ Fiscal Year 2013

- DOL collected nearly a quarter of Billion Dollars (\$249,954,412) in back wages for 269,250 U.S. workers (1/3rd of whom are low wage earners)

➤ Since 2009

- DOL closed 145,884 WH cases
- Collected over 1 Billion dollars in back wages for 1,238, 589 employees

I Should . . .

“Learn from the mistakes of others. [Since y]ou can’t live long enough to make them all yourself.” – Eleanor Roosevelt



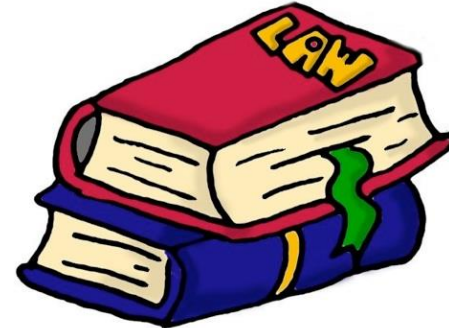
- Seek/Solicit the Advice & Expertise of Go-to Expert on . . .*

Employment Law

The Wage & Hour Protection Laws

➤ Fair Labor Standards Act (FLSA) remedies

- ❑ National Labor Relations Act (NLRA) remedies
- ❑ State/Local “wage theft” laws/ordinances
 - Penal Code (criminal) penalties



The Wage Laws: Federal Fair Labor Standards Act (FLSA)

- Sets minimum wage, overtime pay rate, recordkeeping, equal pay for equal work, & youth employment standards.
- Provides for “collective action” remedies to be sought for a class of similarly-situated employees
- Provides remedy for employer retaliation against complaining workers (including “informal” verbal complaints - *Kasten v. Saint-Gobain Performance Plastics*, U.S. Sup. Ct., 2011)



Coverage of the Act

◆ Who does the Act cover?

Employees (Exempt & Non-Exempt)

Economic Realities Test:

Employee v. Independent Contractor

- Requirements of activity, not job title

Interstate Commerce and Enterprise

- Must be engaged in interstate commerce, or
- Employer must be an enterprise (annual gross exceeds \$500,000)

Coverage of the Act

Recent Trends in FLSA EEOC Investigations & Cases.

➤ Independent Contractor v. Employee

The misclassification of employees as independent contractors is an alarming trend, Too often, misclassified employees are deprived of overtime and minimum wages, and are forced to pay taxes that their employers are legally obligated to pay. - U.S. Dept. of Labor, Wage & Hour Div., News Release.



Minimum Wage

➤ Basic Requirements

- \$7.25 per hour

➤ Tipped employees

- \$2.13 per hour

➤ Opportunity Wage

- Under 20 yrs. Old
- First consecutive 90 days



Minimum Wage

➤ Exceptions

- Full-time students
- Apprentices
- Mentally/Physically Disabled

➤ Limitations on Deductions

- Cannot cause net pay to fall below minimum wage



Overtime

- FLSA requires that non-exempt employees be paid one and **one-half times the “Regular Rate”** for all hours worked in excess of 40 hours
- 7 consecutive days (168 consecutive hours)



WEEKLY TIMESHEET			
	Mon	Tu	Wed
Start Time	9 AM	9 AM	
End Time	5 PM	6 PM	
Reg Time	8 -	8 -	
Over Time		1 -	



Overtime

- Hours worked
 - Suffer or permit to work
 - Rest and Meal
 - Commuting
 - Preliminary and finishing
 - Lectures, meetings, training
 - Waiting

A photograph of a 'Weekly Time Sheet' form. The title 'Weekly Time Sheet' is written in red, slanted text at the top. Below the title is a table with the following columns: 'Date', 'Time In', 'Lunch/Dinner', and 'Out'. The 'Time In' column has sub-columns for 'am' and 'pm'. The 'Lunch/Dinner' column has sub-columns for 'In' and 'Out'. The 'Out' column has sub-columns for 'am' and 'pm'. The table is partially filled with lines, suggesting it is a form to be used for tracking work hours.

Date	Time In		Lunch/Dinner		Out	
	am	pm	In	Out	am	pm

Overtime

- ◆ FLSA does not require OT Pay for:
 - Weekend or Holiday work
 - Vacation, holiday, severance, and sick pay
 - Rest periods, holidays off, and vacation time
 - Raises and fringe benefits

UNLESS, OT hours are worked on such days.

The Wage Laws: Federal

Fair Labor Standards Act (FLSA)

➤ Exempt Employees.

- Executive, Administrative, Professional & Outside Sales Employees
- Commissioned Sales Employee
- Computer Professionals
- Drivers, Driver's Helpers, Loaders, & Mechanics;
- Farmworkers;
- Salesmen, Partsmen, & Mechanics;
- Seasonal & Recreational Establishments



The Wage Laws: Federal

FLSA Exemptions (cont.)

◆ Students Learners

- Bona fide vocational training program
- Necessary to prevent curtailment of opportunities for employment
- Will not displace an employee
- Number of student learners will not be a large portion of work force



Min. Wage & Overtime Exemptions

➤ Salary

- Employee is **paid on a salary** basis if:
 - ✓ Employee regularly receives a predetermined amount constituting all or part of the employee's compensation on a weekly or less frequent basis (e.g., bi-monthly)
 - ✓ Reg. Amount received without regard to the number of days or hours worked or the quality of work.

Min. Wage & Overtime Exemptions

➤ Salary *(cont.)*

- Not required to pay full salary:
 - ✓ in initial or terminal week of employment
 - ✓ for weeks when employee is on unpaid leave under Family Medical Leave Act (“FMLA”).

Min. Wage & Overtime Exemptions

➤ Salary

- Employee is **not paid on a salary** basis if:
 - Certain **Deductions** are **made** from amount paid because:
 - ✓ of operating requirements of business; or
 - ✓ work is unavailable despite the fact that the employee is ready, willing, & able to work.

- Tip: Safer to discipline than deduct

Min. Wage & Overtime Exemptions

➤ Paid A Salary (cont.)

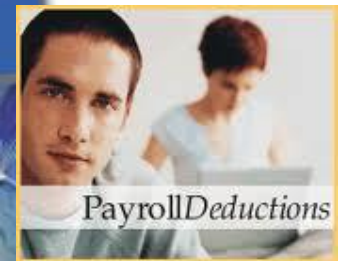
- Deductions/Offsets **permitted in *limited instances*** including:

Where employee is absent:

- for one or more full days for disciplinary suspension, personal reasons, other than sickness or disability
- for jury duty, attendance as a witness, or temporary military leave. Offsets allowed for pay received as jury fees, witness fees, or military pay for a given week



"You can keep the payroll — I just want the payroll *deductions!*"

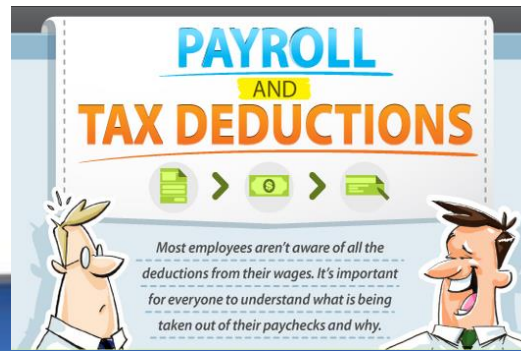


Min. Wage & Overtime Exemptions

➤ Paid A Salary (cont.)

▪ **Deductions/Offsets** permitted for:

- penalties imposed in good faith for infractions of safety rules of major significance (*e.g.*, smoking in explosive plants)
- unpaid disciplinary suspensions imposed in good faith for violations of workplace conduct rules pursuant to a written policy



Min. Wage & Overtime Exemptions

The “Fluctuating Work Week” (“FWW”)

Requirements

- ✓ Must receive full salary each week
- ✓ Hours must fluctuate
- ✓ Must have clear agreement with employee
- ✓ Must be sufficient to meet min. wage

Advantages

- ✓ Overtime 70% less in heavy work weeks

Disadvantages

- ✓ Must pay full salary in light work week

Min. Wage & Overtime Exemptions

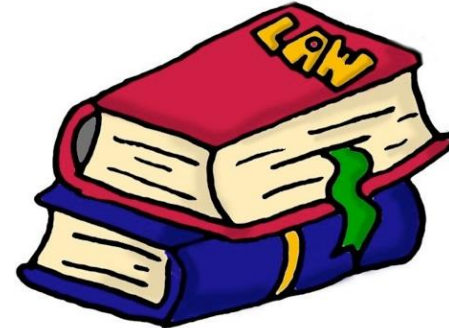
FWW Example:

☐ Employee is Paid \$400/week or \$10/hr

- Works 40 hours
 - FWW - **\$400** (No OT worked)
 - Trad. OT - **\$400** (No OT worked)
- Works 50 hours
 - FWW - $400/50 \times .5 \times 10 \text{ hrs. (OT)} = \40 (**\$440**)
 - Trad. OT - $400/40 \times 1.5 \times 10 \text{ hrs. (OT)} = \150 (**\$550**)
- Works 60 hours
 - FWW - $400/60 \times .5 \times 20 \text{ hrs. (OT)} = \66.67 (**\$466.67**)
 - Trad OT - $400/40 \times 1.5 \times 20 \text{ hrs. (OT)} = \300 (**\$700**)
- Works 30 hours
 - FWW - **\$400**
 - Traditional - **\$300**

The Wage Protection Laws

- Fair Labor Standards Act (FLSA) remedies
- **National Labor Relations Act (NLRA)** remedies
- State/Local “wage theft” laws/ordinances
 - Penal Code (criminal) penalties



The Wage Laws: Federal

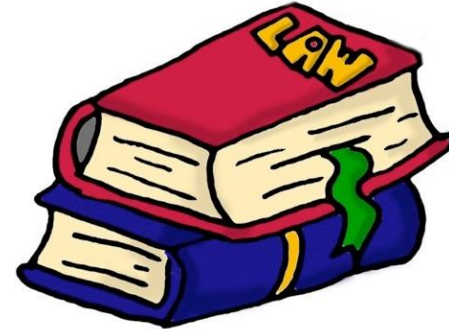
National Labor Relations Act (“NLRA”)

- Section 8 (a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Sec. 7 of the NLRA, including the **right to engage in protected “concerted activities.”**
- **Wage-related examples:**
 - (A) **Wage discussions are protected** concerted activities in both unionized and non-unionized work places
 - (B) Having a **rule against discussing wages is unlawful**, even if no employee has engaged in protected concerted activity by discussing wages
 - (C) Using **social media/Internet to engage in protected activities**, including negative or critical comments about employer, **may be protected** in certain instances



Wage & Hour Protection Laws

- Fair Labor Standards Act (FLSA)
- National Labor Relations Act (NLRA)
- **State/Local “Wage Theft” laws/ordinances**
 - **Penal Code (Criminal) penalties**



Why Should I . . . ?

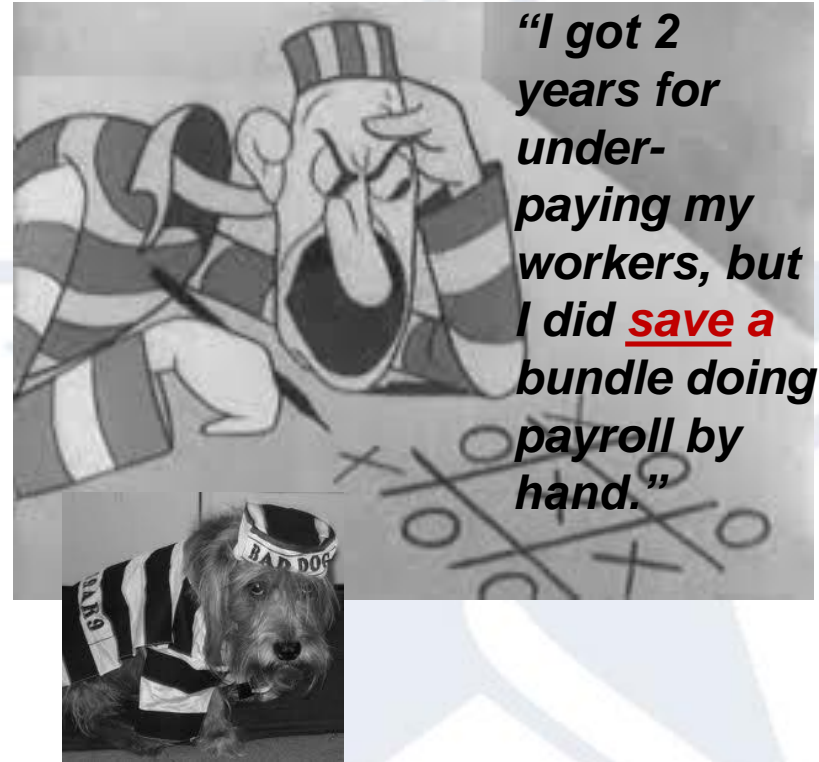
“Wage Theft” is Against *State* Law

- “Wage Theft”?
- A “national epidemic” which has prompted most states and many local governments to enact “wage theft” laws and local ordinances
- Internet websites and organized campaigns focused upon passing stronger “wage theft” laws have multiplied



Texas Response to “Wage Theft”

- **Texas Payday Law and Texas Labor Code** (Code § 61.053) provide civil remedies for victims of wage theft. The Texas Workforce Commission can order an employer to pay wages owed if the employer acted in “bad faith.”
- **“Wage Theft Bill”** (SB 1024) signed by Tex. Gov. Perry - May 27, 2011
 - Makes it easier for police departments to **arrest employers** who fail to pay their workers in full;
 - Closed a legal loophole which allowed employers to avoid criminal “theft of services” charges (Penal Code 31.04) by making a minimal payment to their workers



“I got 2 years for under-paying my workers, but I did save a bundle doing payroll by hand.”

New Texas “Wage Theft” Legislation

Senate Bill 340 - *Administrative Penalties assessed by the TWC against employers for failure to pay wages:*

- Would make administrative penalties mandatory for “bad faith” wage theft violations if employer:
 - (1) has a history of previous wage violations
 - (2) fails to pay wages as an act of discrimination or retaliation
 - (3) fails to pay wages to multiple employees at the same time
 - (4) fails to pay wages knowing such failure was a violation of state law
 - (5) shows “reckless disregard” for the requirements of state law

Note: In 2012, the Texas Workforce Commission found “bad faith” in less than 12% of the 1,028 cases filed; current law does not define “bad faith.”

Other Wage-Related Legislation

HB 950: Passed Tex. House & Senate but **vetoed** by Gov. Perry on June 2013 –

- would have extended the time limit for filing claims of pay discrimination to include each pay period in which an allegedly discriminatory underpayment was made (regardless of when the practice began) – similar to the federal “Lilly Ledbetter” statute

VETO!

I'm glad you're comfortable with making less money than me.



someecards



Learning from Others Mistakes



Complacent / Asleep at the wheel!

Practices to Avoid



**What
Should[n't]
I Do?**

Avoid Minimum Wage Theft

Pay workers below FLSA minimum wage (\$7.25/hr) because:

1. “Bargain” struck with employer
2. Paid “by the job” at below statutory hourly rate required
3. Deductions/offsets/or “rounding errors” reduce pay below minimum wage rate



Avoid Time Clock Adjustments

- ❑ Force employees to work “off-the-clock” (e.g., through lunch/rest breaks) but:
 - Auto-deduction of meal break time; or
 - Do not treat as time worked (sometimes referred to as “the Wal-Mart pinch”)
- ❑ “Rework” employee’s work time hours from day-to-day or week-to-week to avoid overtime premium pay



What Should n't I Do?

Time Rounding

- *Double Tree Hotel Dallas/Richardson* **pays \$102,592** in back wages for time rounding violations & “off-the-clock” work



Avoid “Pressure” Tactics

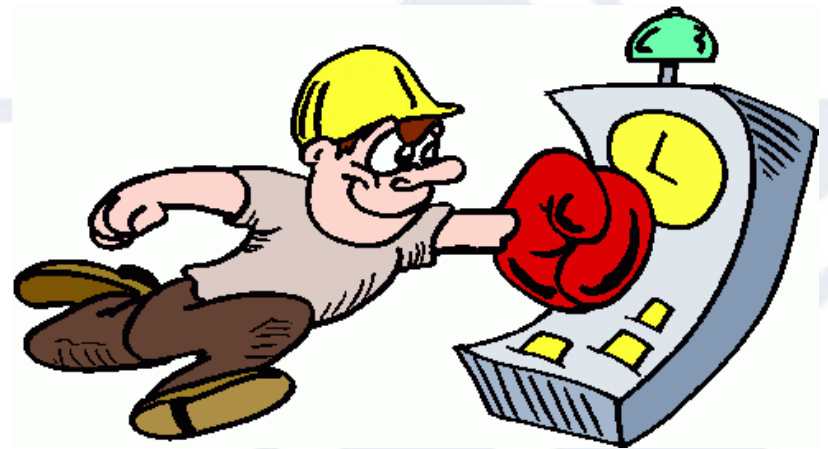
Pressure employees to pay to
keep their jobs

OR

Pressure employees to pay for
their own safety equipment
which the employer is mandated
by law to provide at no cost

OR

Pressure employees to work “off-
the-clock” to reduce labor costs



What Should [n't] I Do?

Fail to pay for pre-shift work or meetings.



- *Hilton Reservations Worldwide* pays **\$715,507** in minimum & OT back wages for pre-shift work.

Avoid Paycheck Pitfalls

- ❑ Issuing paychecks that do not reflect total compensation owed

OR

- ❑ Issuing paychecks that “bounce”

OR

- ❑ Refusing to issue or withholding paychecks (particularly a final paycheck)



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Avoid Not Tipping

Reducing tip amount by allowing all employees to share in the “tip pool” (e.g., dishwasher)

Keeping or diverting an employee’s tips



Avoid Misclassification Underpayment

- Misclassify employees to keep them from receiving overtime pay



What Should n't I Do?

Misclassify Workers



- Strip Club, “*The Great American Dream d/b/a Pin Ups Nightclub*,” misclassified dancers as independent contractors in violation of FLSA
 - ***Exotic Dancers* are “the most important” Employees.**

What Should [n't] I Do?

➤ Misclassify Workers

- *Hibachi Grill & Supreme Buffet* sued by DOL for **\$2 Million** in back wages.



What Should [n't] I Do?

Misclassify Workers

➤ Half Million Dollars from ONE Employer.

- \$478,000 in back wages & liquidated damages &
- \$22,000 in Civil Money Penalties



▪ Issue/Facts.

- Hawkins Tree & Landscaping (Employer) misclassified workers as independent contractors;
- failed to pay workers overtime; &
- failed to provide adequate records of hours worked.

▪ Result.

- Consent judgment award damages and orders employer to retain a CPA accounting firm to conduct bi-annual audits of its pay practices to determine FLSA compliance.



Avoid FLSA “Wage Theft” Issues

- Joint Employment (“jobbers,” “day labor,” “subcontractors”)
- Contingent Workers (“self-employed independent contractors”)
- Interns (“trainees,” “students,” “temp-to-perms”)



UNPAID INTERNS
LAWSON & CUTLER & GILBERT... website

Home

Should you have been paid for your unpaid inter...



FINDING AN INTERNSHIP,
Building Your **Resume**,
Making **Connections**, and
Gaining **Job Experience**

Entry-level jobs are dis...
against unpaid interns

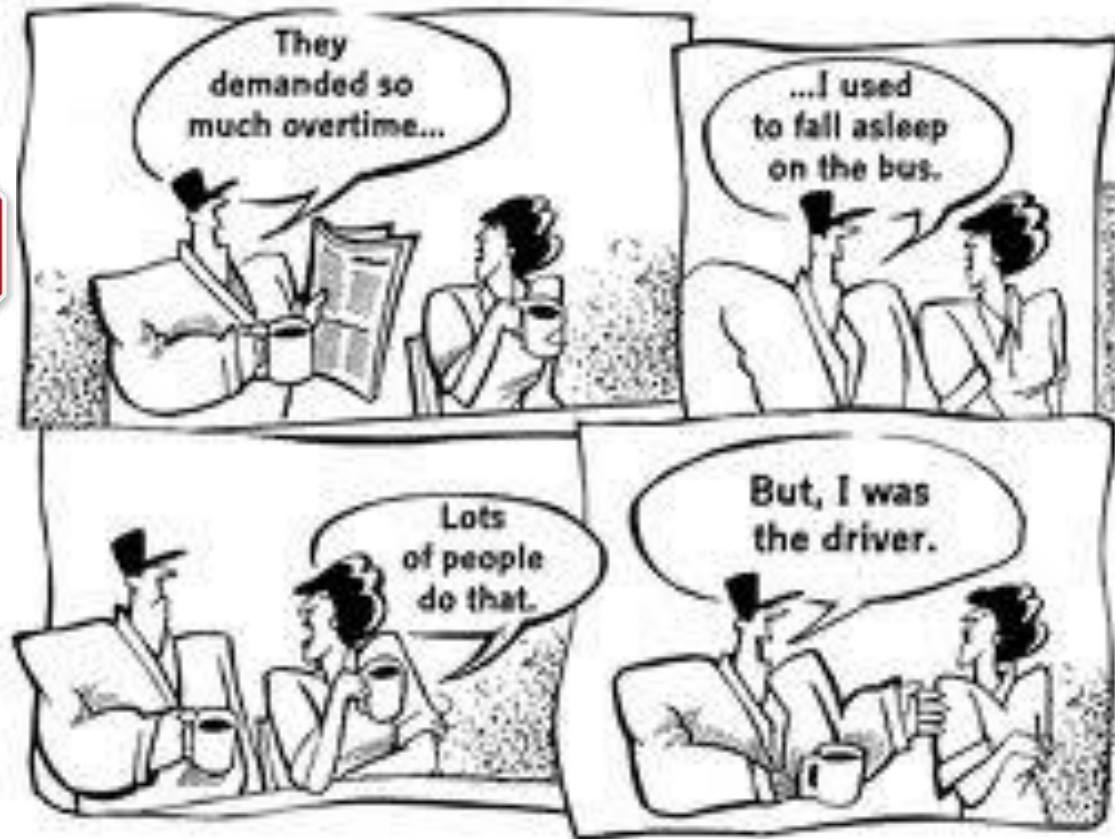


Avoid Forced/ Unpaid Overtime

- Pre-Approval Required.*




- Work from Home.
- On-Call.
- Mandatory Meetings.



What Should n't I Do?

Refuse/Fail to pay overtime.



Is your overtime pay wrongfully withheld?

We protect your rights!

Get Started Now!

Avoid Overtime Calculations Violations

➤ Bonuses

▪ Productivity (Non-Discretionary)

- Bonuses for handling more work are included in regular wage rate

▪ Discretionary

- Christmas bonuses not included in regular wage rate

➤ Salaried Employees

- ***Do not assume they don't receive overtime!***



What Should [n't] I Do?

❑ Fail to include Non-Discretionary Bonus in Reg. Rate

➤ Kinder Morgan

- Settled for \$830,422 in Back Wages



➤ SkyWest Airlines

- Undisclosed Settlement Amount



Tips: *Hourly* Pay Compliance

- Good Policy & Procedures in Employee Handbook:
 - Accurately report all regular and overtime hours worked regardless of authorization;
 - Off-the-Clock Work prohibited;
 - Overtime Must be Authorized;
 - Disciplinary action, up to & including discharge for false time reports.
 - Review pay statements each pay period & report incorrect pay immediately;
 - Report Managers who demand false time reporting or alter reports (over/under report).
 - Anti-retaliation policy & “Open Door” Procedure for Reporting Violations

Tips: *Hourly* Pay Compliance

- Good Policy & Procedures in Employee Handbook:
 - **Perform an Audit**, but Beware of Attorney Client Privilege Issues
 - Consider **Paying Back Wages** Based on Audit Results

“Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.” - Dept. of Labor, Wage & Hour Div.

- Keep Employees Informed

Tips: *Salary* Basis Compliance

- Have Salaried Employees **sign & agree to the Job Descriptions** that Include:
 - (1) FLSA Exemption language; and
 - (2) Statement that employee considers the description accurate
- Periodically **Review & Update Job Descriptions** with Employee Input
- Have Supervisors fill out **Exemption Test Questionnaires**



Tips: *Overtime* Compliance

- Method for Employees to Affirm Hours Worked and Pay
- Implement Mandatory Training for Hourly Supervisors
- Have Clear Policies About Remote Email Access and Other Devices
- Have Clear “Break” Policies

	Mon	Tu	Wed
Start Time	9 AM	9 AM	
End Time	5 PM	6 PM	
Reg Time	8 -	8 -	
Over Time		1 -	

Any Questions?



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