

# The Fair Labor Standards Act; And the Myths of Exempt Employees

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The U.S. Department of Labor estimates that nearly 70% of all employers are operating in violation of the [Fair Labor Standards Act of 1938](#) ("FLSA").

Under both the FLSA and the Minimum Wage Law, an employer is required to pay his employees 150% of their regular rate for each hour worked over 40 during each working week; otherwise known as "overtime." The Illinois Wage Payment and Collection Act is simply an Illinois Statute that requires an employer to pay an employee as promised, and helps to curtail wage theft.<sup>1</sup>

It is typical for employers who wish to avoid complying with the relevant overtime laws to engage in a variety of evasive tactics, such as improperly classifying employees so they appear to fall within certain exemptions from the statutes, or by disguising wages as reimbursements or bonuses--to name just a few of the less sophisticated tactics. While there are legitimate exemptions, in my experience they are less prevalent than many imagine. Moreover, it is the employer's burden to prove the employee's exempt status.

One of the most common misconceptions employees have is that if they are paid on a salary basis then they are exempt from the overtime provisions of the ("FLSA") under the guise of being a "professional employee" or one of the other "white collar exemptions." This is simply not true! In reality, very few positions meet the eligibility for exemption under the "white collar" exemptions. Moreover, being paid on commission or salary does not necessarily exempt an employee from the protections of these laws.

Further, when an employee is underpaid for overtime his employer not only must the employer compensate the employee for all past due wages, but he must pay an additional equal amount in liquidated damages. Thus, an employer will owe the employee double the amount originally underpaid.

However, the biggest penalty an employer may face for an FLSA violation is the Collective or Class Action. Usually when an employer fails to pay one employee properly, there are others in the midst, and who are eligible to opt in to the law suit as a party Plaintiff; and this creates a strong incentive for the employer to pay his employees according to the law, as the figures of unpaid wages and penalties often end up in the millions.

Despite these penalties, violations of these statutes remain extraordinarily commonplace--presumably because employers know employees are too afraid of retaliation to ever to complain. However, the FLSA has extremely strict penalties to prevent an employer from retaliating against employees who assert their rights under the law. Moreover, the [Illinois Whistle Blower Act](#) also protects an employee who files a complaint against their employer in Illinois.

The reason for these provisions is that enforcing the FLSA helps the economy and the country. Thus, both the federal and state governments encourage employees to assert their rights under the federal and/or state wage and hour laws in a court of law. Bringing suits for unpaid overtime wages is not an attack on small businesses or the struggling economy, it is quite the opposite!

It should also be mentioned that, even though the federal and state governments, have set up administrative agencies to enforce such laws, such agencies are backlogged and, in my experience, often have precisely the opposite effect of their intended function. An employee must understand that such agencies do not represent the employee, they represent the State of Illinois or the United States (depending on which agency you file with). Further, such agencies have an interest in clearing their case load, and in my extensive experience, it is virtually guaranteed that a substandard and inaccurate investigation will be conducted.

Thus, if an employee has any realistic expectation of receiving the wages and/or overtime wages that he or she is owed, plus the required monetary penalties, retaining an attorney with experience in wage and hour laws is essential. As explained before, it ultimately costs very little to nothing to the employee in the end to do so, depending on the attorney that the employee chooses to retain.

If you are working over 40 hours a week and not receiving time plus one half for each hour over 40, or are otherwise not being compensated for work performed, despite what your employer or your employee handbook claims about your status; or if you are being paid in an unnecessarily complicated and strange manner you might very well be owed overtime wages.

1. See article on new amendments to the Illinois Wage Payment and Collection Act.