

Bugbee & Conkle, LLP

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FLSA CLAIMS ON THE RISE

The number of lawsuits involving Fair Labor Standards Act (FLSA) claims has grown significantly. In 2007, the most recent year for such statistics, the Wage and Hour division in the Department of Labor recovered more than \$220 million in back wages for more than 341,000 employees.

The FLSA covers those employees who work for companies or organizations having two or more employees and doing at least \$500,000 a year in business, or hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies. In addition, the FLSA also protects employees if their work regularly involves them in commerce between states ("interstate commerce"). This can include producing goods to be shipped out of state, regularly making telephone calls to persons located in other states, handling records of interstate transactions, traveling to other states for their jobs, and doing janitorial work in buildings where goods are produced for shipment outside the state.

Here are four mistakes employer's should work on addressing:

1. Failing to pay for non-approved overtime.

The FLSA does not distinguish between approved and non-approved overtime. If the employee works the overtime you are required to pay time and one-half the regular rate for that overtime. But an employer is not without recourse, since an employee who violates a company policy by working non-approved overtime can be disciplined or terminated for that policy violation.

2. Misclassifying assistant managers.

For an employee to qualify under the "executive" exemption, the employee must be paid on a salary basis at a rate of at least \$455 per week. In addition, the employee must meet each of the following three tests: 1) their "primary duty" is management of the enterprise or of a customarily recognized department or subdivision;



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2) they customarily and regularly direct the work of two or more other full-time employees or the equivalent; and 3) they have the authority to hire or fire, or make suggestions and recommendations as to hiring, firing, advancing, promotions or other status changes that are given particular weight (which should be included in their job descriptions in an effort to prevent later disputes over the exemption).

3. Assuming salaried employees are automatically exempt from overtime.

Each individual employee must qualify for one of the specific exemptions provided by the statute. Each exemption has specific tests, and each salaried employee must be evaluated to see whether the exemption applies. Job titles and descriptions aren't the determining factor any more than paying a salary is. Courts and Department of Labor construe all exemptions narrowly, and the burden of proof is always with the employer.

4. Automatic deductions for meal breaks.

Many employers automatically dock their hourly employees for a 30 or 60 minute meal break per day. Although this is not illegal, it is a frequent subject of litigation and liability. If you are sued by an employee or audited by the Department of Labor, it is the employer's burden to prove the hours actually worked by your hourly employees. If employees later claim that they worked through lunch most days, it will be extremely difficult for you to prove that each of your employees actually took a full lunch break each and every day for which an automatic meal break deduction is made.

For more information concerning compliance with the FLSA please contact a member of our Labor and Employment law practice group at (419) 244-6788:

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