# The 7 Myths of Wage and Hour Compliance

A guide for every business owner and manager in Corporate America

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Inside this e-Book you'll be exposed to a process that can help you reach wage and hour compliance. You'll discover some incredible principles that will save you an enormous amount of time, money, and headaches in your business. We hope you'll enjoy it! Remember, you have our permission to pass it along to whomever you wish!

# IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nevertheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context.

This e-Book is **NOT** a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that may arise in any employment-related dispute.

If you are anticipating any employment-related disputes then we **STRONGLY** encourage you to seek legal counsel as soon as possible.

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# Introduction

*"There is a place in Reno, Nevada, that practically mints money. It's not one of the many casinos in town. Nor is it one of the legal brothels that operate in the area. It is a law firm, located in a wing of a private home nestled in the foothills of the Sierra Nevadas. . . Attorney Mark R. Thierman pursues a practice that in recent years has won his clients hundreds of millions of dollars from some of the biggest names in Corporate America—and produced tens of millions for himself. . . Thierman sues companies for violating 'wage and hour rules'. . . This litigation has exploded nationwide. . . [and] un-detonated legal mines remain buried in countless companies. . ."*

*Businessweek - "Wage Wars" by Michael Orey - October 1, 2007*

You've probably never heard of Mark Thierman. I hadn't either, that is, until I read *Businessweek's* story on the wage wars that are raging across the nation.

You may or may not have had the distinct pleasure of dealing with wage and hour litigation. If you haven't, then you should consider yourself lucky. If you have, then you're an unfortunate member of one of the nation's fastest growing clubs, one that no one wants to be a member of.

Regardless of whether you have or haven't dealt with this issue, chances are wage and hour compliance in some form has crossed your mind a time or two, and most likely, not in a very positive light.

You've probably even thought to yourself: There's got to be a better way to do this. Something's missing – does compliance have to be *this* hard?

I sure did.

For years I religiously followed what I believed were all the necessary compliance issues that pertained to my business. However, time and time again I hit a massive brick wall – ignorance and pride.

For all my heartache and worry, I would fail on Department of Labor (DOL) audits time and time again. On top of it all, company morale was in the dumps. My

employees became more and more concerned over the minutia of how the business was managed, rather than whether or not the company was profitable.

Running my business became something I had to do out of necessity rather then something I enjoyed doing.

Maybe you can relate.

The worst part about it was, I could not for the life of me figure out why I was having such a hard time! I thought I was doing everything I had been told to do. In fact, I thought I was doing more than what most employers were supposed to do.

But no matter how much I tried, I couldn't escape the ever present fear of a wage and hour claim being brought against me.

So I began looking for real answers as to why I was spinning my wheels.

To make a long story short, I finally did figure out what was wrong. And when I did, my entire view of managing wage and hour compliance changed forever.

I'd like to share with you what I discovered:

**Almost everything I've ever observed about wage and hour compliance is wrong!**

And here's why: Most business owners have very little, if any, formal training when it comes to implementing or understanding wage and hour compliance issues.

Your average, everyday American entrepreneur is encouraged to jump right in, with no prior experience whatsoever, and make critical decisions regarding employee status, compensation, and so on.

As a matter of fact, there exist numerous government-backed programs to encourage the hiring of employees through tax breaks, grants, etc. But very little exists that promotes receiving education related to the laws about employee

compensation. The little that does exist requires a great deal of time and resources that very few business owners have the liberty of spending.

This has severe side effects.

In 2009, a survey was conducted of 1,800 senior legal and human resource "professionals." The results revealed that over one third of the responding organizations had been clobbered with one or more wage and hour claims.

Keep in mind these were "professionals" who deal with human resource issues on a daily basis! If they couldn't do it, what chance did your or I have?

In fact, wage and hour class action suits now outnumber all other types of employment discrimination class actions combined!

It keeps getting worse! The DOL has predicted that wage and hour litigation hasn't even come close to reaching its peak. Some claim this is partly due to the fact attorneys are such a tight knit community. As a result, there has been an unprecedented evolution of strategies to bring more companies to court.

Most law firms agree that it's not a case of "if," but "when" nearly every company in the US will have to deal with some form of wage and hour suit.

In the book "Organizational Behavior: Managing People and Organizations" by Ricky W. Griffin, J. Nelson Thomas, a well respected attorney from Rochester, New York said the following, "*This is the biggest problem for companies out there in the employment area by far. I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that [a wage and hour suit] will.*"

Why is that? Why are wage and hour lawsuits so easy for attorney's to win? Well, consider for just a moment all the ways an employee can be paid above or beyond their normal wage. You have overtime, vacation, and holiday time. Then there's sick leave, maternity leave, jury duty, and all kinds of time away from the job – all of which can still be eligible for compensation.

After all, time = money correct? It's no wonder the government so closely monitors laws regarding compensation. These laws are being abused all the time. Compound the fact we're dealing with antiquated and very difficult to understand laws and you've got yourself a powder keg ready to explode. Remember, many of these laws where drafted over 70 years ago during a time when the work place was a very different landscape then it is today.

For one reason or another, employees across the nation are waking up to the fact that wage and hour laws are not being adhered too and they want their day in court.

Well, I had put up with this for far too long. I received the necessary training and even developed tools to make sure adhering to some of the major compliance issues was a no-brainer – and guess what? My fears over wage and hour lawsuits have stopped completely!

If you're willing to set aside any predisposed beliefs you currently have regarding the difficulties of wage and hour compliance... just for a moment... you'll discover how quickly and easily you can do this too.

Wage and hour compliance doesn't have to be hard.

Choosing to not educate yourself and using inadequate tools – like trying to use a screwdriver to pound a nail – make it hard. Sure you might get the job done, but if you keep doing it, chances are something's going to break or go horribly wrong.

My purpose in writing this e-Book is to help you "de-program" some of the nonsense and misconceptions that thrive in the workplace. Hopefully, with some clearly presented facts, you'll reach the same realization I did: compliance is possible.

Welcome to the first step towards becoming a 100% wage and hour compliant business.

Enjoy.

# Myth #1: I know I'm not compliant, but I don't care

As I was compiling this list, I tried to think of which myth was the most pervasive, the most common, the most detrimental to a business.

I tried to narrow it down, but it was just too hard to select a definite winner. They're all so bad, but this one was a serious contender for the title:

"*No ones said anything yet, so I must be compliant.*"

A close second was this myth:

"*I can't afford to be compliant - it's not worth the effort.*"

Some employers even think that overtime compliance is optional and even a luxury, especially in a difficult economy. They treat it like a benefit that is no different than say health insurance or days off. In their minds, when times get tough, there go all your benefits, including the right to overtime.

In reality, this couldn't be further from the truth. Overtime is not something you decide to pay one month and not the next.

Regarding those who think they can't afford to be compliant, probably haven't had to wade through the financial nightmare of a wage and hour claim. The truth is, one disgruntled employee or one overtime miscalculation and your entire business could be at risk...and I'm not talking about fines that merely amount to a slap on the wrist, either.

There is a reason why wage and hour litigation is the fastest-growing litigation...ever. It's because it's lucrative. How lucrative, you might ask? The average federal class action settlement is $23.5 million, most of which usually goes to the lawyers.

In 2009 alone, the top 10 wage and hour settlements totaled $363.6 million, a 43.9% increase over 2008 and it's just getting started.

Can you really afford to be non-compliant?

With so many employers out of compliance, it's relatively simple to find violations. After all, the burden of proof rests solely on you, the employer. In other words, if an employee makes a claim they should have been paid overtime, it's up to you to prove they shouldn't have. You're the one that needs to provide records. You're the one that needs to provide reports. The employee doesn't need to do anything. We'll talk more about that in a later section.

These lawsuits expose employers to devastating jury verdicts and numerous public relations nightmares. As a result, many companies are compelled to settle these lawsuits as quickly as possible, just to stop the hemorrhaging.

For those of you who are assuming you must be compliant based on the fact you haven't been sued yet, well the DOL has this little nugget to ponder over:

**More than 80% of employers are out of compliance with state and federal wage and hour laws!**

80%??!! That's eight out of every ten businesses that are not compliant! Has it started to sink in yet?

To further add fuel to the fire, your current employees don't even need to be the ones instigating legal action. Some lawyers are proactively seeking out employees and convincing them to file wage and hour suits against their current or *former* employers.

That's right. We're not talking about just those employees that currently work for you. Employees that worked for you years ago can still come forth with a claim against you.

The truth is, most companies want to comply. However, for any number of reasons, they don't. Some find the practice overwhelming. Others may feel the gamble is

worth more than the cost to become compliant. Still others feel that keeping up with both federal *and* state regulations is time consuming and expensive.

Just in case you didn't catch that, it's not enough to be compliant with just the federal government. You must also follow your individual state, and in some cases, municipal laws.

For example, in Massachusetts, the fine or penalty for a violation is not $1,100 as under the Fair Labor Standards Act or FLSA, but $25,000! The employee can also win not just double back wages, but triple back wages and attorneys' fees.

Even states that do not provide for triple damages may impose similarly steep fines or penalties. In Connecticut, fines can scale up to $10,000 per offense, be levied directly against corporate management, and could also include substantial jail time – all for as little as $2,000 in unpaid overtime.

In New York, employers engaged in willful violations can be fined an additional amount of up to one quarter of the unpaid wages along with paying the employee's attorneys' fees. Company management that engages in willful misconduct may also be subject to misdemeanor charges for a first offense or felony charges for a second offense. There is even the possibility of one year of jail time and penalties up to $20,000.

Tens of thousands in fines and possible jail time?! That's a heck of a lot more than just a slap on the wrist!

So yes, employers need to place as much emphasis on compliance with state overtime laws as with federal law. It's important to do a state-by-state analysis of the applicable laws especially if you have employees in multiple states. Most states have their own criteria and penalty schemes and you should not simply assume that employees exempt from overtime under federal law would be exempt under state law.

Given the penalties associated with some states, the cost is worth the benefit of making sure that any overtime program is compliant with both the federal and state levels.

## What happens when a claim is brought against you?

Under the FLSA, if you violate the overtime provisions, an employee may either bring their own lawsuit or file a complaint with the Department of Labor. The DOL then performs a wage and hour audit in order to determine whether or not the employee's claim is warranted.

If it is, they automatically assume that other employees, past or present, could also have been infringed upon. As a result, they perform an audit on "all" your employees – past and present.

Yes, it is very time consuming... and no, you are not compensated for your time spent in collecting the information request by the DOL. On top of that, the time frame issued by the DOL to provide this information is usually fairly short. In other words, if you don't have the information readily available, it's more than likely you'll fail the audit.

This leads us to our first wage and hour compliance secret:

### Wage and Hour Secret

**Effective, consistent, readily available record keeping can make all the difference in the outcome of an audit.**

There is nothing that will affect the outcome of DOL audits more than good record keeping. In some cases, I've seen claims dismissed overnight, all because of a quick and thorough submission of the requested records.

Yes... good record keeping can be that effective.

However, if you don't have good records, you'll more than likely be found guilty. You'll end up paying not only what's due, but also any number of additional fines and penalties. The most common ones are listed below:

- **Back Wages:** Payment of any overtime an employee earned but was not paid.

- **Liquidated Damages:** Normally assessed at double the amount under back wages.

- **Attorneys' Fees:** Employer pays for all the employee's attorneys' fees.

- **Civil Penalties:** If the violation is found to be willful or deliberate, a civil penalty of up to $1,100 per violation may be imposed.

- **Criminal Prosecution:** Possible in egregious circumstances where willful or deliberate intent can be shown.

Keep in mind this only covers the federal side. As I outlined above, states have their own overtime laws, and these laws can be even more generous to employees than the FLSA.

We'll talk more about effective record keeping a little later. For now, let's address our next myth.

# Myth #2: My company is small and under the radar

Allow me to offer a metaphor to illustrate the basis of this myth.

In many ways, thinking you're too small to be noticed by the federal government is like standing in a field, extending an iron rod over your head while the mother of all lightning storms approaches. Only in this field, you're not alone. Thousands of others, all holding rods of varying lengths and sizes, surround you.

Imagine watching the ominous storm clouds roll in. Picture the lightning strike off in the distance and feeling sorry for whomever it must have hit. Imagine the panic you might feel as the storm approaches and as each strike becomes brighter and more frequent.

Some may feel protected by the fact so many others surround them. Others may feel a little at ease thinking that others must have longer rods than their own and will most likely be struck first.

Think again!

Even though so many others may surround you, does anonymity really make you any safer? I guess it depends on the level of risk you're willing to take doesn't it? I mean, if the risk of being struck means nothing more than a slight burning sensation, then some may elect to simply deal with it and treat the storm as an inconvenient annoyance.

The truth is, being struck by lightning does a lot more than leave a slight burning sensation. It can be devastating and life threatening, just like a wage and hour lawsuit can be to your business.

Wouldn't it make more sense to simply let go of the rod?

This is exactly what compliance lets you do. It allows you to put down that rod so that you can focus more on your business instead of on the storm.

Small companies are at just as much risk of litigation as larger companies, sometimes even more. This is usually because they lack the infrastructure larger companies have managed to build up over the years. The result, informal record keeping (if there is any record keeping at all) and an inherent willingness to provide employees with as much flexibility as possible.

It could also mean more leniency when it comes to allowing employees to work through lunch, or willing to stay a little later, or come in a little earlier. Employees in small businesses have a greater tendency to let this issues slide because of this "take one for the team" attitude. Often they feel these actions are necessary simply to keep the small business alive.

However, just because an employee may have volunteered to work that extra shift or answer calls during his or her lunch break, doesn't mean they volunteered to not be paid the overtime they might have accrued as a result of this extra work. Sure they may not have issue with it today, but what about tomorrow? A year from now? After they've quit and now work for someone else? Remember, they don't need to be currently employed to submit a claim against you.

Furthermore, in an effort to save as much money as possible, many business owners try to manage all aspects of their business by themselves. Many feel their personal knowledge gleaned from their own employment history is sufficient to know how to classify their employees correctly.

Others are just plain terrified to learn the truth and would rather turn a blind eye on the subject.

So whether you think you're too small or that your chances of getting caught are slim to none, consider this: The Obama administration's emphasis on regulation and enforcement has spawned more government-initiated litigation than ever before. As a result, 250 additional examiners have been hired by the DOL in an effort to identify as many non-compliant businesses as possible. There are plans to add even more over the next few years.

These newly-hired examiners are targeting industries such as healthcare, food services, and hospitality with intense scrutiny, while stepping up compliance efforts in general across all industries.

However, to be perfectly fair, there is a virtual "line in the sand" that defines the size of a company in order to be under the umbrella of the FLSA regulations. In other words, it is possible to be "too" small. BUT – before you wipe your brow and think you're safe, let's take a close look at what it means to be "too small".

In order to qualify as a business whose employees are protected by the FLSA, that business must meet one of the following two conditions:

- Gross at least $500,000 a year, or
- Be engaged in interstate commerce.

Seems easy enough... right? Remember, this is an either/or situation. In other words, you only have to meet one of these two conditions, not both.

It's easy to understand the first condition, grossing at least $500,000 a year – pretty straightforward. However the second condition is dismissed all too quickly especially by companies who have a presence in a single state and believe they only do business with people in that state. However, you might be surprised at how quickly a business can become eligible for FLSA compliance simply because of this rule.

In my small mountain town, I have a friend who is an artist with a small gallery where he displays his work. Assuming my friend grosses far less than $500,000 a year, does this exclude him from FLSA regulations?

Not necessarily, especially in today's e-commerce age. Under the FLSA, even if your business does not gross enough annually to be covered by the law, individual employees may fall under the law's protection because of the interstate commerce condition.

Interstate commerce? But it's just a local neighborhood art gallery! It can't possibly have a multi-state presence, can it?

That may have been a correct assumption 10-20 years ago, but not any longer.

My artist friend may appear on the books as a very small business bringing in far less than the required amount in annual revenue. However, as long as his gallery also offers shopping via their website and there is at least one employee fulfilling any out-of-state orders placed via the phone, this satisfies the interstate commerce rule.

That's right... the most common reasons why small businesses qualify for the interstate commerce condition is that they deal with out-of-state clients, take out-of-state calls, or ship out-of-state.

So, even if the business, as a whole, is exempt from the FLSA because it is grossing far less than $500,000 per year, there could be at least one employee who may fall under the Act as he or she is handling interstate orders.

Think that interpretation is too broad? The DOL doesn't. They consistently interpret individual employee coverage under the FLSA to include any:

"*. . . employee such as an office or clerical worker who uses a telephone, facsimile machine, the U.S. mail, or a computer e-mail system to communicate with persons in another state*"

And notes that "*Interstate commerce includes such activities as transacting business via interstate telephone calls, the Internet or the U.S. Mail. . . .*"

In short, even for the smallest, most otherwise local businesses, having a website or taking out-of-state orders over the phone can bring employees under the aegis of the FLSA regardless of how much that company may gross annually.

Now that we've established just how easily some, if not all, of your employees can suddenly become eligible for FLSA protection, now what?

Considering that the majority of litigation brought against employers has to do with misclassification of employee status, it's worth taking a closer look at what being exempt actually means.

# Myth #3: Hourly employees get overtime, salaried never do

It sure would be nice if it were that easy.

This myth also has a close relative, which often takes the form of gibberish such as this:

"*It doesn't matter what a salaried person is doing, they get a fixed wage for whatever they do.*"

More about that in a minute. . .

First, let's talk about the severe ramifications of misclassifying an employee and the difference between exempt and nonexempt.

## Exempt or Nonexempt. . . that is the Question

Here it is, about as straightforward as it gets: Hourly, or nonexempt, employees are eligible for the benefits and protection of the FLSA – including overtime.

On the other hand, exempt employees are not offered any of the protections guaranteed by the FLSA.

The problem arises when employers assume that just because someone is salaried, they're automatically exempt. The truth is there are quite a few factors that can make that statement false. It's those factors that are causing all kinds of grief to employers across the nation.

## A Brief History Lesson

So why has it become so challenging to classify employees? Why the sudden surge in wage and hour lawsuits? What has changed in the workplace? It seemed easy to determine, at least a few decades ago, who was eligible for overtime and who wasn't.

Prior to the 1980's, highly structured, traditional manufacturing and industrial establishments dominated the workforce. It was relatively easy to determine who was management and who was labor, who was salaried and who was hourly, and as a result, who was paid overtime and who wasn't.

Similarly, the line in the sand between professional and technical employees was simple to draw, based on the nature of the work and the level of education required.

However as technology became more prevalent in the workplace, an entirely different set of unique, white-collar skills were also introduced. As the workplace become dominated by individuals working with these types of skills, the lines became more difficult to draw and harder to distinguish.

For example, some of the individuals in question were highly paid, highly trained, and highly educated employees, some even had advanced degrees. However, according to the now 70+ year-old law, these employees were clearly not professionals, management or executives so therefore should receive overtime.

Then there are professionals, such as school teachers, who are not entitled to overtime, but are paid less at a base salary than many technical employees who do qualify for overtime. The higher wages often muddied the difference between who was exempt and nonexempt in many employers' minds.

Furthermore, managers of small businesses, particularly in the retail industry, not only perform what are regarded as management functions but also spend a considerable amount of time working in sales and dealing with customers. These tasks may cause the manager to lose the exemption status and become eligible for overtime as well.

As you can see, it's no wonder that countless businesses are struggling with this problem.

## What Exactly Does Nonexempt Mean?

As we outlined earlier, when an employee is classified as nonexempt, it means the employee is entitled to a minimum wage, overtime, as well as other protections

under child labor, and equal pay laws. All of these rules, laws, and policies can be found under the Fair Labor Standards Act of 1938 or FLSA.

So naturally, if an employee were "exempt" from these protections and laws, you would not need to extend those protections to that employee. Hence the word "exempt" – they are exempt from the protection.

However if you want to classify an employee as exempt, you must follow some very strict guidelines.

One of the easiest guidelines and perhaps most often misunderstood, is that if you pay your employee an hourly wage, they are automatically nonexempt. No ifs, ands, or buts - it's that straightforward.

However, this is where many employers make a mistake and why it's so often misunderstood. They assume the opposite must be true – if hourly employees are always nonexempt then that must mean salaried employees are always exempt regardless of what they do.

Not true. Not true at all...

So why do employers prefer to classify employees as exempt, rather than nonexempt? The answer should be obvious. In most cases it's easier (and cheaper) for an employer to pay an employee if they are classified as exempt.

Just think about it: If an employee is truly exempt, you don't have to track time, and his or her paycheck is pretty much the same from pay period to pay period, no matter how much they work. On top of that, budgeting your workforce and forecasting payroll is a breeze.

Unfortunately, this has led to a lot of abuse and consequently is the root cause of nearly all wage and hour lawsuits. Employers are sometimes blinded by the benefits and completely ignore the law.

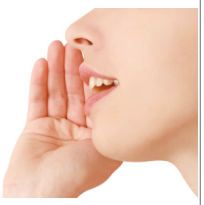
In an effort to simplify the process of employee classification, employers have unfortunately adopted a trend that has lead many into hot water. That is the

assumption that an employee's job title is the basis of whether or not they are exempt.

Well, to start down the path of understanding on how to classify an employee, we have to start with one very important principle, which happens to be our next major secret:

**Wage and Hour Secret**

**Do not classify employees by their titles... EVER! Make sure employees are really managers before paying them like managers.**



AT&T and its subsidiaries are a perfect example of how assuming titles qualify an employee for exempt status. They are currently facing a $1 billion dollar lawsuit brought by "managers" who were not paid overtime simply because of their title.

The affected employees are titled "first level managers" or "level one managers." According to the lawsuit, first level managers perform primarily clerical duties, such as relaying information between "real" managers and field technicians, and do not have sufficient discretion to be deemed managers.

The suit alleges that they are misclassified as exempt employees and given managerial titles, specifically to avoid overtime. While the outcome of this case is still to be determined, it appears that technically the managers are right. Regardless, AT&T will spend millions defending this lawsuit.

Now that we've established the importance of properly classifying your employees based on their job "duties" and not their job title, what are those duties that distinguish between exempt and nonexempt?

## What Employees Are Considered Exempt?

Unfortunately, a completely straightforward answer does not exist. It would be great if every job title ever created could be put in a spreadsheet along with a detailed job description and a column that states "exempt" or "nonexempt."

However, as we've just pointed out, job titles are the worst way to classify an employee. Therefore employers are left to their own discretion to classify their employees based on their understanding of the employees' role in the company. In other words, only *you* can make that call based on how *you've* defined your employees jobs.

Once again, I know I've said it before but considering how often this is abused, it's worth bringing up again. Titles are of no importance. You must base your classification upon what they are actually doing day-to-day. Being said, let's see if we can outline some of the more common day-to-day tasks and see whether or not they fall under exempt or nonexempt status.

## Types of Exemptions

There are dozens of industry specific exemptions, many of which aren't very helpful to most businesses. For example, employees who process maple syrup have their own special exemption, as do lumberjacks, fishermen, and sheepherders.

The exemptions that are most often used are those referred to as "The White-collar Exemptions." These are typically reserved for administrative, executive, and professional employees.

Because of the benefits provided by an "exempt" status, most employers try whenever possible to fit their employees into these exemptions. However, they don't always fit. Actually, they rarely do, and employers must make a judgment call for those employees who are "on the fence" between exempt and nonexempt.

Just remember that to qualify for the given exemption, all the conditions must be met. If even one is left out, the employee doesn't qualify. You can't assume that just because an employee may qualify for 9 out of the 10 conditions, that you can ignore the one that doesn't fit. It may be close, but close doesn't count when it comes to employee classifications.

To make it a little easier to understand, it may be helpful to use a common form of reference that most of us can relate to, Hollywood. After all, most of us have our favorite television or movie character, right?

So at the end of each definition look for the Hollywood character example and see if you could classify the character based on the exemption definition you just read.

## The Executive Exemption

The executive exemption is intended for mid- to high-level managers and supervisors. To qualify for the "Executive" employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate no less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or the equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Problems occur with this exemption when managers are in reality MINO or "managers in name only." They lack any real authority over personnel or departments. It further complicates the matter when executives wear multiple hats and do not spend a sufficient amount of time actually managing other employees. This is commonly found in small businesses.

**Hollywood Exempt Executive Character:**
The geriatric Mr. Burns of The Simpsons is arguably the best example of a qualifying exempt executive. He owned the business, met the salary requirement but most importantly, all you ever saw him doing was managing the often-inept employees of his nuclear power plant. He was the quintessential boss, his authority absolute and unquestioned. He never imagined getting his hands dirty by doing day-to-day

chores. He had employees take care of that, meaning that he was never in danger of spending less than half his time managing.

**Hollywood Nonexempt Executive Character:**
The primary reason why Jim Halpert, the Assistant Regional Manager (at least for a season or two) on The Office, would be a nonexempt executive, is that he spent the majority of his time selling Dunder Mifflin paper products rather than managing. He rarely, if ever, directed the work of any of the other sales associates or employees. Similarly, his co-worker, Dwight Schrute had the title, "Assistant to the Regional Manager," which was truly "in name only."

## The Administrative Exemption

The administrative exemption is not only the most confusing of the white-collar exemptions but is also the most often abused. In other words, when other, more specific exemptions cannot apply (e.g., no executive exemption because an employee has no hiring or firing responsibilities), employers often turn to the administrative exemption as a last resort.

The administrative exemption is intended for mid- to high-level support employees such as buyers, marketing employees, human resources professionals, assistants to high-ranking executives, and anyone else who provides the multiple ancillary services needed to run a business.

As with all the white-collar exemptions, administrative employees must receive a minimum salary and they must spend more than 50 percent of their time performing exempt job duties.

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate no less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

There is one last condition that makes the administrative exemption unique among the white-collar exemptions. That is the so-called "production exception," a carve-out that is often overlooked and creates a great deal of problems for employers.

According to the production exception,

"*. . . employees who are directly involved with the creation or provision of the employer's final product or service cannot qualify under the administrative exemption.*"

For example, if an employer's end product is technical troubleshooting, no one directly involved with providing this service can qualify as administratively exempt, even if they meet all of the other criteria listed above.

The production exception is perhaps the biggest pitfall of the administrative exemption. Other problems occur when employees perform manual work as part of their jobs, or when low- to mid-level employees are not given sufficient discretion and authority over matters of significant importance.

Whether, and to what extent, employees have "discretion and authority" generally depends on the diversity of the problems they encounter (expansive or cookie cutter?), the diversity of the options they must consider to solve the problems, and whether they have enough autonomy to decide on a course of action themselves.

**Hollywood Exempt Administrative Character:**
As the Tony Starks Personal Secretary in Iron Man, Pepper Potts likely qualified for the administrative exemption. She performed non-manual desk duty, she regularly and directly assisted an exempt executive employee, Tony Stark and she had nothing to do with Stark Enterprises end product. Therefore she was not in danger of falling into the production exception.

**Hollywood Nonexempt Administrative Character:**
Liz Lemon, the head writer in the series 30 Rock is a good example of how the production exception can make things very confusing when trying to classify administrative employees. She has all the qualifications that normally would qualify

employees for the administrative exemption: She functions with little to no direct supervision (except occasionally from Jack Donaghy), and she handles matters of undeniable importance – talking overreacting actresses out of their dressing rooms.

The problem, however, is that her duty as a writer means she is directly involved in the end product of the show, TGS with Tracy Jordan. Thus, she falls squarely into the production exemption and is therefore a nonexempt employee.

## The Professional Exemptions

There are three different professional exemptions: The learned professional, the creative professional, and the computer professional.

### The Learned Professional

The learned professional exemption is intended for employees who do work that requires advanced knowledge in science or learning that is generally acquired through a specialized degree.

Employees who acquire comparable knowledge through other means, such as training and experience, can sometimes qualify for the exemption, but only in rare circumstances.

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate of no less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

State law can often vary substantially from federal law. For example, in California, employees must work in one of eight specified fields to qualify for the learned professional exception: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting.

Problems occur with the learned professional exemption when employees do jobs that do not actually require their advanced degrees, such as a lawyer doing sales, or when jobs do not actually require advanced knowledge.

As a general rule, the more employees in a job who do not have a specialized degree, the more likely it is that the job does not require advanced knowledge.

Also, it is generally difficult to extend the exemption to people who have acquired their advanced knowledge through means other than formal education that results in a legitimate degree. Apprenticeships, vocational training, on-the-job training, etc. doesn't count.

**Hollywood Exempt Learned Professional Characters:**
Finding characters that would qualify as exempt learned professionals is actually pretty easy these days: Dr. Gregory House, House (he's a doctor); Will Schuester, Glee (teachers automatically qualify for the learned professional exemption); Temperance Brennan, Bones (Emily Deschanel's character is a forensic anthropologist); and Denny Crane, Boston Legal (an attorney).

**Hollywood Nonexempt Learned Professional Characters:**
The following character appears to not qualify for the exemption. Tobias Fünke, the once chief resident of psychiatry at Massachusetts General Hospital on the show Arrested Development who, despite a medical degree, wishes to become an actor. So despite his advanced degree as a doctor, he obviously wouldn't apply those skills while trying out for stage or film therefore he would be nonexempt during her tenure as an actor.

## The Creative Professional

The creative professional exemption is intended for employees whose jobs truly depend on creativity, imagination, and talent, such as artists and designers.

The work must be original and creative in character, meaning that exempt employees must have significant discretion and authority over the eventual expression of the work, rather than simply filling in blanks or copying work that was created by others.

To qualify for the creative professional employee exemption, all of the following tests must be met:

The employee must be compensated on a salary or fee basis at a rate of no less than $455 per week; The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Problems arise under this exemption when employees have jobs that focus more on their non-creative attributes (e.g., diligence, accuracy, and so on), and when employees do not have sufficient creative control over their work.

This can occur either when employees are using templates or existing work to copy or fill in, or when they are given such stringent guidelines that their work amounts to simple assembly of pre-existing elements of the guidelines, rather than true creation.

**Hollywood Exempt Creative Professional Characters:**
There have been a number of characters that probably would have qualified for the creative professional exemption: Frank Rossitano, 30 Rock (the trucker hat-wearing, childish, sarcastic writer at TGS); Beatriz Suarez, Ugly Betty (America Ferreras' character was a features editor for Mode magazine); and Elliot DiMauro, Just Shoot Me (a photographer for Blush magazine).

**Hollywood Nonexempt Creative Professional Characters:**
Likewise, there have been a few characters that likely would have been nonexempt: Bruce Nolan, Jim Carrey's character in Bruce Almighty (as a news reporter; news stories usually are not deemed to be sufficiently creative to qualify writers for the exemption); and Matthew Brock, NewsRadio (the news reporter and office weird guy).

## The Computer Professional

The computer professional exemption is generally intended for employees who create sophisticated code, programs, and other applications.

So, how can an employer tell which computer employees are exempt from the overtime pay requirements? What does an exempt computer employee look like? Believe it or not, they are rare. Occasionally, computer employees may fit into one of the regulation's exemptions however it's not that often.

To qualify for the computer employee exemption, all the following tests must be met:

- The employee must be compensated on a salary or a fee basis at a rate of no less than $455 per week or, if compensated on an hourly basis, at a rate of more than $27.62 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
- The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to the operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer professional exemption exempts from overtime pay requirements such positions as computer systems analysts, programmers, software engineers, and other "similarly skilled" workers.

In order to qualify for this exemption, the computer employee's primary duties must be some combination of determining functional specifications for, or designing,

developing, documenting, analyzing, creating, testing, or modifying, computer systems and programs.

The primary questions are, what is their "primary duty"? What is the main purpose of their job? Performing these tasks occasionally is not enough. But, the exempt employee may perform a combination of these tasks to qualify for the overtime pay exemption.

**Hollywood Exempt Computer Professional Characters:**
There is a surprising lack of computer professional characters that would qualify for the exemption on television today. One such candidate might be Howard Wolowitz from The Big Bang Theory. In a few episodes, Simon Helberg's character is shown writing source code for one of his applied physics experiments.

**Hollywood Nonexempt Computer Professional Characters:**
On the other hand, most of the other computer professional characters that appear on television would most likely not qualify because they are generally depicted as support staff. The Geek Squad support technician Chuck Bartowski on the series Chuck would not qualify because his job appears to be technical troubleshooting, rather than actually writing code as was the case above. Remember Chuck's primary duty as a Geek Squad technician is not creating, modifying, or adapting systems and software. Instead, he's a troubleshooter applying well-established techniques, or a repairperson.

## The Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales, or obtaining orders or contracts for service or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

## The Highly Compensated Employee

When the FLSA were amended in 2004, one of the "victories" for employers was the newly created highly compensated employee exemption.

Under this exemption, an employee whose duties are not sufficient to make him/her ineligible for overtime pay under one of the traditional white collar exemptions outlined above, can still be exempt if he/she is a "highly compensated" worker.

To qualify as a highly compensated employee, all of the following must be met:

- The employee earns a total of $100,000 or more, which includes at least $455 per week on a salary basis;
- The employee's primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

In short, even if an employee's primary duties do not qualify him or her for one of the white collars exemptions, the employee can still be exempt as long as he or she earns over $100,000.00 per year and regularly performs any job function, which is an exempt duty performed by an executive, professional or administrative employee.

The problem is that not all 50 states have fully adopted this exemption. For example, Hawaii does not recognize the highly-compensated employee exemption. Rather it has its own version, which excludes employees that receive a guaranteed weekly minimum salary of $2,000.00. The effect of this is that, while an employee who receives a significant amount of his or her compensation in the form of commissions or bonuses may be exempt under the FLSA, the same employee may be entitled to overtime under Hawaii's law if he or she does not have a weekly salary of at least $2,000.00.

Other states, such as Pennsylvania, refuse to recognize the highly paid exemption altogether.

As you can probably imagine, this poses continuing problems for employers that innocently rely on this exemption and do not check to see if it's valid under state law. The problem is exasperated by the fact that the overtime claim of even one employee who is making six figures a year can be huge.

Make sure to check your local laws before assuming that your highly- compensated employees are not entitled to overtime.

## What Employees Are Considered Nonexempt?

Naturally we should spend a little time outlining some of the more common, clearly defined definitions for those who are always considered nonexempt.

### The Blue-Collar Workers

As was implied in the title, the "White-color Exemptions" are for white-collar workers – or in other words, non-manual labor workers. "Blue-collar" workers are those who perform work involving repetitive operations with their hands, physical skill, and energy.

Some of the most common blue-collar job descriptions include:

Non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers.

All of these individuals are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt no matter how highly paid they might be.

### Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police officers; detectives; deputy sheriffs; state troopers; highway patrol officers; investigators; inspectors; correctional officers; parole or probation officers; park rangers; fire fighters; paramedics; emergency medical technicians; ambulance personnel; rescue workers; hazardous materials workers; and similar employees, regardless of rank or pay level.

This rule also includes those who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

## Other Laws & Collective Bargaining Agreements

Remember the FLSA only provides "minimum" standards. That means that your state or municipality could have higher minimum wage or lower maximum workweek requirements than those defined under the FLSA. As long as the state or local law does not waive or reduce the FLSA, you are obligated to honor it.

That also means that employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. Once again, as long as these agreements do not waive or reduce FLSA protections, there is nothing that prevents employers from doing so.

Also, remember that wages are the least important provision. An employee only needs to make $455 a week or $23,660 annually to meet the wage criteria. An employee paid below this minimum salary level is eligible for all the protection the FLSA provides, including overtime even if the employee meets the executive, administrative, professional or computer job duty requirements.

Executives, administrative employees and professionals who earn $100,000 or more annually are required to satisfy only one of the requirements in order to be classified as exempt.

The requirements of the FLSA are just one more reason why job descriptions are so important, even in the smallest of companies. This leads us to our next secret:

## Wage and Hour Secret

**Document your employee's job duties while describing them as clearly as possible.**

The better and more detailed you can make the job descriptions, the better. Especially when you are dealing with the DOL and a wage and hour audit. This can prove invaluable in your defense for justifying whether or not an employee was paid overtime.

# Myth #4: Only if it's over 80 hours do you get overtime

This is a case where just because one thing is true doesn't make something of equal value true as well. In other words, most employers base payroll on at least two workweeks. Each week comprises of 40 hours. So therefore, it's natural to assume that if 40 + 40 = 80, then anything worked over 80 hours would be overtime.

Well, yes but what if someone worked a total of 76 hours over two weeks – or what about 54 hours over two weeks? Are they entitled to overtime?

Yes, they very well could be.

The reason is that overtime is not based on 80 hours. Instead, it's based on a 40-hour workweek. That means that it is very possible to work 26 hours in one workweek and 44 during the next equaling a total of 66 hours. However, if no overtime was paid, the employer would be breaking the law.

See how easily complacency can lead to problems? Rather than calculating hours worked by workweek, some employers simply lump all the hours together into a single pay period total. The math is simpler, the tracking is easier, it's no wonder so many do it this way.

To further complicate the matter, some employers pay on a semi-monthly basis (i.e. on the 1st and 15th of each month.) Since the pay period often ends before the end of the workweek, they are inclined to use the 86.67 hour calculation method. To them, it's significantly easier then trying to deal with pay periods that begin or end during the middle of a workweek.

Unfortunately, it's completely wrong. Once again, this is a quick way to get into trouble with the "Feds." I would guess that roughly 25% of the clients I've worked with over the years thought that calculating hours this way was correct.

## Bi-Weekly Payrolls or Every Two Weeks

Calculating overtime for a bi-weekly payroll is generally not too difficult. That is of course if you are assuming the pay period begins when the workweek begins. However that isn't always the case.

When they don't coincide, then a bi-weekly payroll can become just as complicated as a semi-monthly payroll. Its no wonder the DOL strongly encourages employers to align their workweeks with their pay period start and end dates.

Below is an example that represents a fairly typical bi-weekly payroll. See if you can determine how much overtime would be due at the end of the pay period:

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Total Hours |
|---|---|---|---|---|---|---|---|
| 27th<br><br>Worked<br>0 hrs | 28th<br><br>Worked:<br>9 hrs | 29th<br><br>Worked:<br>9 hrs | 30th<br><br>Worked:<br>9 hrs | 1st<br><br>Worked:<br>8 hrs | 2nd<br><br>Worked:<br>8 hrs | 3rd<br><br>Worked:<br>8 hrs | Workweek:<br>51 hrs<br><br>Pay Period: 51 hrs |
| 4th<br><br>Worked:<br>0 hrs | 5th<br><br>Worked:<br>8 hrs | 6th<br><br>Worked:<br>8 hrs | 7th<br><br>Worked:<br>8 hrs | 8th<br><br>Worked:<br>8 hrs | 9th<br><br>Worked:<br>8 hrs | 10th<br><br>Worked:<br>0 hrs | Workweek:<br>40 hrs<br><br>Pay Period: 91 hrs |

If you guessed a total of 11 hours in overtime then you would be correct. Here's the breakdown:

Total Hours in Pay Period: 91 hours
Total Overtime: 11 hours

## Semi-Monthly Payrolls or Twice per Month

Calculating overtime for a semi-monthly payroll can be tricky. . . very tricky because more often then not, the pay period will begin or end party way through a workweek. Therefore in order to accurately calculate overtime, you must keep a record of how many hours were worked the previous pay period so that you know how many hours may need to carry over to the current pay period.

Here's an example that further illustrates how challenging calculating overtime can be with a semi-monthly payroll. The area in green indicates the pay period that is currently being compensated. See if you can determine what the correct amount in overtime should be:

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Total Hours |
|---|---|---|---|---|---|---|---|
| 27th<br><br>Worked<br>0 hrs | 28th<br><br>Worked:<br>9 hrs | 29th<br><br>Worked:<br>9 hrs | 30th<br><br>Worked:<br>9 hrs | 1st<br><br>Worked:<br>8 hrs | 2nd<br><br>Worked:<br>8 hrs | 3rd<br><br>Worked:<br>8 hrs | Workweek:<br>51 hrs<br><br>Pay Period: 24 hrs |
| 4th<br><br>Worked:<br>0 hrs | 5th<br><br>Worked:<br>8 hrs | 6th<br><br>Worked:<br>8 hrs | 7th<br><br>Worked:<br>8 hrs | 8th<br><br>Worked:<br>8 hrs | 9th<br><br>Worked:<br>8 hrs | 10th<br><br>Worked:<br>0 hrs | Workweek:<br>40 hrs<br><br>Pay Period: 64 hrs |
| 11th<br><br>Worked:<br>0 hrs | 12th<br><br>Worked:<br>8 hrs | 13th<br><br>Worked:<br>0 hrs | 14th<br><br>Worked:<br>0 hrs | 15th<br><br>Worked:<br>8 hrs | 16th | 17th | Workweek:<br>15 hrs<br><br>Pay Period: 80 hrs |

If working off the assumption that any time worked over 80 hours in a pay period is overtime, then one might calculate that this employee is not owed any overtime. After all, the total time worked for the pay period is exactly 80 hours.

Days in Pay Period - 15
Week 1: 1st through the 3rd = 24 hours
Week 2: 5th through the 10th = 40 hours
Week 3: 12th through the 15th = 16 hours
---
Total for Pay Period = 80 hours

The next incorrect assumption some employers make is that when the pay period begins, the workweek total resets to zero. Or in other words, the total time worked resets when the pay period begins. They would argue no overtime is due because the employee never worked more than 40 hours due to their incorrect definition of a workweek.

Consequently, if someone is working under either of these misconceptions they might come to the conclusion that no overtime is owed. If you agree, then brace yourself, but you are incorrect.

Had the employer not paid any overtime, they would have made a serious miscalculation. The reality is, 11 hours of overtime is actually owed.

So if calculating bi-weekly payrolls is so much easier then semi-monthly payrolls then why do so many companies use semi-monthly pay periods?

The reason is accounting.

Bi-weekly payrolls create havoc with monthly reporting and forecasting, since you'll have at least two months per year with three pay periods. This adds an extra pay period to the expense structure for those two months (and lowers it correspondingly for the other months where only two pay periods occurred.)

As a result, businesses are constantly backing out expenses (or adding them back in) to get "apples-to-apples" monthly comparisons.

So there's a trade off. If you have a large number of hourly employees and you're paying semi-monthly, calculating overtime can be confusing, time consuming to calculate, and prone to errors. However your accountants will be much happier.

If you pay bi-weekly, your overtime calculations are a breeze. However, your financials will be trickier to calculate throughout the year.

Since most small businesses can't afford either a dedicated accountant or the extra time required to consolidate financials throughout the year, they general elect to side on the process that seemingly takes a higher priority, financial statements.

Issues such as taking the time to accurately calculate semi-monthly payrolls are generalized and cost-saving assumptions are made. Since they've never been told differently and don't even realize they are making potentially devastating mistakes, they continue with the practice further digging themselves deeper into a wage and hour nightmare.

Since the majority of companies are on a semi-monthly pay frequency, it sheds light as to why so many companies are out of compliance – they're simply miscalculating overtime.

Fortunately, there are systems currently in the marketplace that make calculating overtime for semi-monthly payrolls just as easy as bi-weekly payrolls. We'll talk more about that in a moment.

Either way, all these issues regarding bi-weekly or semi-monthly pay frequencies all boils down to your workweek. It is essential that you understand the definition of a workweek and how it can affect your business when it comes to compensating your employees.

This leads to our next myth . . .

# Myth #5: My workweek begins Monday and ends Friday

Even though your business may be open Monday through Friday, that doesn't mean your workweek begins Monday morning when you open and ends Friday night when you close. Nor does it mean your workweek must match your pay period, as illustrated in Myth #4 above.

## What is a workweek?

A workweek is defined by law as any seven, consecutive 24-hour period that can begin at any time and on any day. In other words, your workweek may start at 5:00 a.m. on Wednesday and end at 4:59 a.m. on the following Wednesday. Or it may start at 11:00 p.m. on Saturday and end at 10:59 p.m. the following Saturday.

It doesn't matter. You can set-up your workweek however you like. Just remember that your workweek must be:

**Any fixed and recurring period of 168 hours or seven, 24 hour days.**

Did you notice the keyword "fixed"? This part of the definition of a workweek can be easily overlooked.

"Fixed" means that once you've established your workweek, you can't change it week-to-week or month-to-month. While it's possible to change your workweek, the DOL strongly cautions doing so and provides methods that help avoid fines and/or penalties. In other words, your workweek, once established, should rarely change if ever.

## Why is a workweek important?

As illustrated in Myth #4, you need to know the hours worked by your employees in order to determine both the minimum wage and overtime requirements. The only way to do that is to have a fixed length of time to compare those hours against. This is where having a workweek comes into play.

For purposes of the minimum wage, the "hours worked" will be the number you divide into your employees' pay to determine the hourly wage. For purposes of overtime, the "hours worked" will be the number you use to determine when you owe overtime.

Oftentimes, calculating how many hours an employee has worked is a fairly straightforward process. Your employees show up for work and their times are recorded.

However, there are a number of questions that may arise that can quickly make a fairly straightforward task such as tracking time, a bit confusing. Some of those questions include:

- What is considered time that should be tracked and paid?
- How should employees' hours be tracked?
- When can employee comp time be given?
- Can pay be deducted for tardy employees?
- Can salaried employees be deducted pay?

We'll attempt to answer each one of these questions below.

## What is considered time that should be tracked and paid?

The simple definition is that employees must be paid for all time worked during regular business hours for which the employee is hired. They also need to be paid for time devoted to the principal activities for which the employee is hired.

But what if an employee works when they shouldn't have? Don't I only have to pay for time I've authorized?

No. The law says that an employee must be paid for all time worked. Specifically it says:

All time which an employee is required to be:

- On duty

- On the employer's premises
- At a prescribed workplace
- Performing work for the employer

You may have noticed that nowhere does it say anything about "authorized time."

Just because you or one of your supervisors might have told an employee not to work overtime or there is a written policy forbidding employees from working overtime, it does not mean that overtime wages do not need to be paid to employees who work unauthorized overtime hours.

For example, if an employer gives an employee a list of tasks to accomplish and makes it clear that these tasks are expected to be accomplished during regular work hours, if the employee then works overtime to complete those tasks, the employer must pay overtime wages to the employee.

The bottom line is this: The FLSA does not limit the hours that may be worked by an employee, but if nonexempt workers actually work more than 40 hours, the records must reflect all hours worked and the employees must be paid for all hours worked. Remember:

**No policies or instructions from you or your supervisors can override the legal requirement to pay overtime.**

However, like with all things regulated by the government, there are gray areas. What do you do about breaks? How should travel be compensated? What about working from home? It is these gray areas that cause problems for a lot of employers.

I'll try to address some of the more common situations below:

- **Meals and breaks:** Generally, you have to pay employees for breaks or rest periods that last no longer than 20 minutes. However, be sure to refer to your state's regulations on the matter. The rules can change drastically from state to state.

- **Multiple jobs:** If the employers are independent of each other, separate treatment is allowed. If, however, the employers are interrelated, the total of the time worked for all the employers is the "hours worked" figure that must be used in computing the employee's pay for minimum wage and overtime purposes. In other words, if you own more than one business and an employee works for more than one of your businesses, you must total all of his or her time to calculate the number of hours worked. That means that just because they may be working for different companies, doesn't mean their hours are separate. Their hours must be totaled together in order to work out potential overtime.

- **Working at home:** If the employee works from home, but you know nothing about it, you don't have to pay the employee for that work. If, however, you have reason to believe the employee is working at home, you have to pay the employee for that work.

- **On-call time:** Depending upon the circumstances, you may have to pay an employee for time on call. It comes down to how much control you have over the employee. If a nonexempt employee has to be available for a phone call and come in to work immediately if needed, you have to pay that employee. But, generally, if the employee is free to do whatever the employee wants to do, you don't have to pay that employee. This is true even though you require the employee to carry a beeper.

- **Orientation or training:** Once the decision is made to hire an employee, any time spent on activities that you require, such as filling out new hire forms, is considered part of working time, and the employee must be paid for that time. This is true even if you send them to a class before or after the workday or on a non-work day. Just remember that if you require it, you have to pay them. On the other hand, compensation is not required for voluntary training. If, however, you tell an employee that a training class is optional but you cause the employee to feel that nonattendance will have an adverse effect

on him or her, the training is not really voluntary, and you have to pay for that time.

- **Travel time:** Time spent traveling during normal working hours must be compensated. Time spent commuting or traveling from home to a train station or airport does not have to be compensated. In other words, you don't have to pay for the employees' time driving to or from the airport. However, once they arrive, they are on the clock. If overnight travel is required, only a portion of that time requires compensation.

- **Employee absences:** Employee absences due to illness, holidays, vacation, time off to vote, or similar causes can be ignored in figuring hours worked under the FLSA, even if the employee is paid for the absences. Whether you have to pay an employee for that time depends upon the policies and rules you've set up (and, in some cases, the state where you live.)

- **Unauthorized overtime:** If an employee works overtime that you didn't authorize, you will still have to pay the employee for that time, that is, if you knew or had reason to believe that the employee was performing the work. In other words, if you know an employee is working overtime that you didn't authorize, you are obligated to stop the employee from performing the work. If you fail to do so, you have to pay for the time worked. This is why many companies adopt and strictly enforce policies to discipline employees who work unauthorized overtime in order to keep the practice from happening.

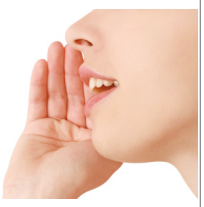
# Myth #6: It doesn't matter how I track my employee time

Federal wage and hour laws do not require you to have a time clock. Actually, to be completely honest, the feds really don't care how you track your employees' time just as long as you are tracking your employee's time.

However, before you decide how you should go about keeping employee time records, you should consider our next little secret:

**Wage and Hour Secret**

**Improving your method of tracking employee time is the single most important thing you can do towards wage and hour compliance.**



Yes . . . It's that important.

Think about it. If your time-tracking method is comprised of your employees turning in handwritten timesheets at the end of each pay period, then you are open to all kinds of errors, issues with falsified records, accountability problems, and so on. Remember, the burden of proof lies with you.

If an employee miscalculates his hours and you don't catch the error, resulting in the employee being underpaid, an auditor is not going to blame the employee and excuse the problem. You'll be held responsible.

Furthermore, simply by introducing an effective time- tracking system in the workplace will make it substantially more likely that you will eliminate employee classification and overtime calculation issues.

Did you know that payroll and time record calculation were literally the fundamental reasons why computers were introduced to businesses in the first place?

The first computers introduced in the early 50s and 60s were designed specifically for these purposes -- payroll processing and record keeping. It wasn't until the late 60s when the third generation of computers were introduced that businesses began to use them for other areas, such as credit card processing, market forecasting, inventory control, and so forth.

Regardless, despite the fact the need for a more accurate method of calculating time records and payroll was established well over 50 years ago, there are still an overwhelming number of companies keeping time records by hand and doing manual calculations.

Considering the low cost of computers along with the availability of any number of time tracking solutions on the market, there really is no excuse why businesses shouldn't be using an automated time-tracking system.

Hopeful I've been able to make an argument as to how time should be tracked (a system that takes the burden of calculation off your shoulders), what about when? Even with something as straight forward as tracking time, the "when" can sometimes raise questions.

## Is it OK to round my employees' time?

Generally, you are required to determine precisely the time your employees have worked, including fractional parts of an hour. There is, however, an exception to the rule.

If you round off your time (for example, to the nearest tenth of an hour), the practice is acceptable if over a period of time the rounding results in the employees getting paid for all the time they actually work.

And in theory, it should: when done correctly, there should be an equal amount of shifts that are rounded down by the same amount, as there are those that are rounded up.

However, in practice, any system can be easily manipulated to the employer's benefit. For example, if employees regularly start 5 minutes early and are held 7 minutes late, that would be 12 minutes per day they are not compensated. Remember the

key word here is "regularly". Unless the employee is given the opportunity to make up that lost time, this type of rounding would not be allowed.

In other words, if your company's rounding policy over time shows favoritism to you, the employer, your rounding practice is out of compliance and would be a target for litigation.

One of the more common and, at the same time incorrect, methods for rounding time is to round the total time worked. For example, assume an employee worked a total of 8 hrs, 6 minutes. Many employers might round the time down to 8 hours, disregarding the actual start or end times.

This is not permitted. The law states clearly that rounding is permitted for start and end times only not the total time worked.

That being said, even if you are confident that your time-rounding policies are compliant, it should be done with a great deal of care. You may think you're being fair, but that doesn't mean your employees or the DOL agrees with you. Amazon.com is currently learning this lesson the hard way.

In November of 2009, a former warehouse worker filed a lawsuit seeking unpaid overtime, plus interest. The suit alleges that Amazon rounded start and end times for shifts to the nearest quarter hour, costing workers up to 15 minutes of overtime pay a day. The lawsuit is seeking class action status, which could draw in up to 21,000 additional plaintiffs. Regardless if Amazon ends up to be correct, there will be hundreds perhaps millions spent in legal fees alone defending their position.

In today's market, with so many inexpensive systems that can track time to the second, there's really no excuse for not tracking time exactly. The "only" reason time rounding was adopted in the workplace in the first place was to help ease the burden of manual time calculations. Prior to the availability of the personal computer, or calculator for that matter, calculating time to the minute was extremely time consuming and heavily prone to error. Rounding was a means to an end that was based on the technology available at the time.

However in today's market place, we couldn't be further from the days of manual calculations. If Amazon can track the tastes and preferences of millions of customers in thousands of product categories, it will be almost impossible for it to claim that it lacks the technology to record actual time worked. The same claim would be almost impossible for any company to make for that matter – especially now.

So can you round your employees time. . . Yes.

Should you . . . No.

Here's a good litmus test. . . If you're currently rounding time and the thought of not rounding time makes you nervous because of the additional expense it might impose due to more time that will need to be compensated. Well, then it's likely you're breaking the law. Since rounding should not show favoritism to either party, especially you as the business owner, then technically, there should be no difference to your bottom line.

## How long do I need to keep records?

This is another very good argument for an effective time system.

As stated by the federal minimum wage, equal pay, and overtime provisions, you must maintain and preserve not only employee records as they pertain to employment history but also their time-keeping records.

What's more, even if your employees or independent contractors are exempt from the federal law, you'll have to keep records to prove that fact. So record keeping is not something you can avoid, exempt or not, salaried or hourly.

Your records must be kept for three years from the date of the last entry you made. Supplementary records (including basic employment and earnings records; wage rate tables; order, shipping, and billing records; and records of additions to or deductions from wages paid such as paid days off) must be kept for two years.

However, the federal payroll tax laws require you to keep records related to payroll and withholding for a minimum of four years after the due date of the relevant tax return. Therefore, it's generally easier to just keep everything for at least four years.

This is, however, one of those areas where individual states could have longer record keeping requirements. Please refer to your state's requirements in order to understand your obligations.

Organization is critical as well. Records will not be considered adequate if when asked for the information, you must gather it from scattered, unrelated, or unintelligible sources.

In other words, having a bunch of sticky notes in a folder that record your employees' days off or time worked will not be considered proper record keeping. As a result, you will most likely fail any DOL wage and hour audit.

On the other hand, by using a system that keeps records in a safe and secure way, then you won't have any problems complying with this rule.

I've personally seen situations where businesses had used warehouses filled with box after box of employee time cards, day off requests, payroll records, and so on. I've also see the aftermath of an effective time system once it's been introduced, literally eliminating the need for thousands upon thousands of square feet of storage space.

You can only imagine the joy the client felt knowing the burden of storing paper records was a thing of the past. Not only that, but the same client has been able to dismiss numerous wage and hour claims simply because they can now produce records so quickly and accurately.

## When can employee "comp time" be given?

Giving "comp time" refers to the practice of giving "compensatory" time off in lieu of overtime to nonexempt employees.

Under federal law, this practice is illegal. If the employee has earned overtime, it must be paid.

So naturally, there is nothing wrong with giving "comp time" to an exempt employee since they are not eligible for overtime.

Only when a nonexempt employee hasn't yet earned 40 hours in a workweek is it permitted to issue comp time.

## Can pay be deducted for tardy employees?

There is no federal wage and hour law that prevents you from making deductions from a nonexempt employee's pay for tardiness or for forgetting to punch a time clock.

If you do adopt this practice, you must do the following:

- Compute the regular rate before the deduction is made.
- Count all the time actually worked by the employee when figuring overtime hours.
- Ensure that the employee's regular rate meets the minimum wage requirement before the deduction is made.
- Not make deductions from overtime pay.

That being said, deducting employee time should be done with great care, even if it's considered common practice to "dock" late employees if they arrive a few minutes late.

However, if an employee starts working before that period of docked time has elapsed, you have to pay the employee for the actual time that he or she worked and cannot "dock" him or her for the full amount of the period.

For example, Sarah calls in to tell you she'll be a few minutes late. According to your policy on tardiness and absenteeism, she'll be docked for 15 minutes' time. If Sarah arrives 5 minutes late and begins working immediately, you still have to pay her for the ten minutes that she worked. So why have the policy to deduct 15 minutes in the first place right if you're just going to have to pay her anyway when she shows up and starts working? Exactly . . .

To avoid this kind of confusing scenario, many companies make it a policy not to allow the employee to begin working before the docked time period has elapsed. That way, you know exactly how much time the employee has worked and you can avoid these types of confusing situations.

## Can salaried employees be deducted pay?

By definition, exempt workers are paid by salary. That means they get the same amount of pay per workweek regardless of how many hours they work in a workweek. However, there are clearly defined situations where it is permissible to deduct pay and when it isn't.

Deducting pay from an exempt employee for absences of less than one day is illegal. You can, however, "dock" an exempt employee's pay for an absence of a whole day.

If an exempt employee calls in sick and plans on being out for the entire day, you can "dock" his or her pay for the whole day and make up for the loss from a sick or vacation leave plan, if you offer those kinds of benefits.

If you dock an exempt employee for any reason other than for a major safety violation, that employee loses their exempt status for that pay period, not just that workweek. If that occurs, then you will have to pay any overtime to that employee that may be due for that pay period.

If you make a habit of "docking" exempt employees for absences of less than one day, you risk losing the exemption completely, which could make you liable for back overtime pay over a longer period of time.

How do you prove that you do not make a practice of docking exempt employees more then allowed? That's right . . Accurate record keeping.

Keep records that show that the employee received the same amount of pay for each pay period. The record must also include notations about the amount of sick time, personal leave, or vacation taken during each payroll period, too. Once again, good record keeping is of vital importance.

Effective August 23, 2004, the Department of Labor expanded the permitted reasons for docking an exempt employee's pay to include serious conduct violations, such as sexual harassment or violence in the workplace.

The new rules also provide that if an employer makes an improper deduction from an exempt employee's pay, the employee's exempt status will remain intact if: the employer has a clearly communicated policy, including a complaint mechanism, prohibiting improper pay deductions; reimburses the employee for the improper deduction; and makes a good faith commitment to comply with the rules in the future.

# Myth #7: I'm not worried - I'm covered by insurance

This is a very common misconception.

There is no way to protect against these claims other than to comply. Employment Practices Liability Insurance (EPLI) usually does not cover overtime violation claims. So even if your company is protected by insurance from unexpected payments for discrimination suits, your company could still face enormous liability if there is a failure to comply with the wage and hours laws.

No matter how you look at it, employers need to wake up to this crisis and begin educating themselves on compliance. The solution is completely within the employer's control.

Fortunately, there are only a few bad apples in the bunch and no matter how many laws or regulations are put out there, they will always try to find a way to cheat the system. If you've read this far, it's very unlikely you're one of them.

More than anything, I hope I've been able to demonstrate that not only is compliance possible, but also worth the time and money it may require to become compliant. The benefits far outweigh the risk.

If you're wondering what it would take to become compliant then you're probably also wondering where to start.

Don't worry; it's not as difficult as you might think.

# Enough Talk, Time for Action - Becoming Compliant

You've read all the statistics. You've seen the consequences of wage and hour lawsuits in the news and read about them online. You're convinced it's a good idea.

Now what?

Some may argue that 100% wage and hour compliance is impossible. Others may say the cost is too great and the time it takes too distracting. Like when adopting any new process into your business, unless you start with a plan then yes, the critics are correct.

The following is a brief outline on steps you can take to begin the process. Each step is designed to get you started. However ultimately you should consider revising each step to best fit your unique business environment. The ultimate goal being not only reaching compliance but ensuring as little disruption to your normal business operations as possible.

## Step #1: Conduct a Wage and Hour Audit

The first of seven key steps starts with auditing your current compliance. Before recommendations can be made, it is absolutely necessary to have a basic understanding of what's currently being practiced.
The assessment of existing policies and procedures is one of the most important undertakings of all the steps. Don't wait for the DOL or state examiners to show up at your door. An internal wage and hour audit will help uncover problems so you can fix them before the examiners arrive.

You can perform your own audit, but you may be better off having an outside expert conduct the exam. Labor laws are complicated. Even if you're sure you understand them, it doesn't mean everyone in your organization interprets them the same way.

I've been in situations where I've asked clients their interpretation of their adopted time keeping policies and without a moment's hesitation, someone in the room would explain it to me. However, no sooner had they finished their explanation, did

one of their associates make the inevitable comment, "That's not how I've been doing it." Lets just say the proceeding discussion among the group became interesting to say the least.

What could be appropriate in one situation may be completely wrong in another. Your interpretation could be completely different than someone else's. Unless you're an expert in labor law, you could miss any number of potential trouble areas.

Beyond that, it's a bit like trying to proofread your own writing. Often typos may slip through because your eyes perceive what you think should be there instead of what's really on the page.

In fact, it's not uncommon for labor law firms to find themselves penalized for wage and hour violations. While successfully keeping their clients in compliance, they missed problems in their own back yard.

"Outside eyes" will often notice important things you've overlooked.

## Step #2: Plan for Implementing Changes

Even before an audit is complete, chances are you've discovered some areas that should be improved or corrected. Remember our statistic earlier, the DOL estimates roughly 80% of all companies are out of compliance.

Some may argue that changing to a new practice is evidence of wrongdoing and legitimizes any potential claims. They fear that change will only encourage the very litigation that you might be seeking to prevent. This shouldn't dissuade you from making any necessary changes. The "Do Nothing" approach is rarely a good idea.

As a matter of fact, some programs offered through the DOL and even some state administrative agencies are designed to allow employers to achieve full compliance without being subject to the same penalties and costs that would accompany litigation.

Whatever the case may be, a well thought out implementation plan must be considered in order to prevent as much blowback and disruption as possible.

## Step #3: Make Available Your Wage and Hour Policies

Once your set of policies and procedures have been approved, make it easy for your staff to follow compliance by educating your personnel to the policies.

Policies and procedures can be 100% compliant, but unless they are consistently followed, what's the point? When supervisors and managers know and understand the correct policies and procedures, they can often identify small issues before they become big problems.

Remember that while there are a virtually unlimited number of areas to cover for employment policies, some are more important than others in terms of preventing wage and hour lawsuits. These areas include:

- Time and manner of wage payment
- Correct classification of employees (exempt or non-exempt)
- Payment for "all" overtime worked
- Timekeeping policy
- Meal and rest periods
- Vacation
- Commissions
- Payment and final wages
- Open door policy
- Whistleblower/Non-retaliation policy

## Step #4: Implement a Wage and Hour Complaint System

This step is simple but potentially revolutionary in what it could accomplish for your organization.

In many other parts of employment law, the concept of self-enforcement is widely used. For example, if someone is suffering harassment, that employee should expect to find some kind of complaint system and investigation process.

If employees are informed about these systems and fail to use them, damages can be reduced and in some cases liability can be eliminated. In other words, if an employee knew beforehand and didn't use the procedure, the business may no longer be liable. You can imagine how invaluable these systems have become.

This step applies those same principles to wage and hour compliance for at least two reasons:

- First, current law and legal trends suggest that courts will recognize complaint-reporting systems as part of an affirmative good faith defense;

- Second, these systems actually work. They allow improved enforcement of policies and faster corrections when mistakes are made.

## Step #5: Create Wage and Hour Training Programs

More often than not, the greatest failing of any system is a lack of knowledge on how to use that system effectively by your staff. Just ask yourself, considering all the software and hardware currently in use in your organization, is it all being fully utilized? In most companies, only 20-30% of the systems currently in place are being used to their full potential.

As outlined under Step 3, your company could have 100% compliant policies, but if they are not fully understood and implemented, all that time and effort would be wasted.

In almost every legal challenge, the question is raised regarding the company's training. Companies that show and teach real compliance can often defeat these challenges.

It's also highly recommended that those investigating wage and hour complaints should be just as well trained as those investigating sexual harassment complaints.

## Step #6: Minimize Future Exposure Through Technology

Technology is a critical component in making wage and hour compliance cost effective and immediately available. Simply because many of the areas where companies routinely fail a DOL audit, have to do with areas that technology can provide a solution for. Areas such as record keeping, accurate time tracking, and proper overtime calculations to name just a few.

While handwritten timesheets are better than nothing, an automated time and attendance system will provide significantly more accurate results. Add a biometric component that prevents "buddy punching" and you have a system designed to ensure accurate time recording. Most importantly, since the burden of proof lies with you, not the employees, you can adequately demonstrate that good faith measures have been put in place to ensure as high a level of accuracy as possible.

Once you have a system in place, make sure all hourly employees use it every day. When it comes to requesting days off, both salaried as well as your hourly personnel should use the system.

## Step #7: Conduct Periodic Reviews of Adopted Policies

Even though this step is listed last, it's certainly not least.  Its importance cannot be overstated.

A growing legal requirement of employers is that they are not only required to implement lawful compliance systems, but that they also verify that the compliance systems are working. It is expected that if noncompliance is discovered, corrections will be made.
While some might argue this constitutes evidence of a violation and give potential legal recourse to an employee, it is also evidence that the system is working and that the violations are individual and not company wide. This can serve as solid evidence that no basis exists for a lawsuit, class action or otherwise.

# Conclusion

So there you have it. "The 7 Myths of Wage and Hour Compliance." I was a victim of every single one for quite a long time. I never knew any better simply because that's all I'd ever observed in the marketplace.

If I hadn't been willing to do some research and ask the right questions, who knows how long I would have put up with the constant worry about the next lawsuit or disgruntled employee?

I hope you've enjoyed this e-Book but even more, I hope it's given you some fresh insight into wage and hour compliance and helped you realize that it isn't as difficult or confusing as it may seem.

If you're interested in finding out how you can put an amazing system to use for your organization, click here to learn more. This is a system that I along with a team of others, built after years of research and thousands of hours of case study. Organizations across the nation have found it invaluable in their day-to-day business.

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