Should I Be Paying Overtime?

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One of the most confusing areas in operating any business or organization with employees are the wage and hour laws. There are hundreds of regulations on how much employees must be paid, what deductions can and cannot be made from a paycheck, when wages must be made to employees, and so on.

While most employers are careful to follow these rules on employee wages, there is often a common misperception regarding when employers must pay overtime. To a certain extent, we still imagine a "blue-collar" versus "whitecollar" world where more physically demanding jobs are compensated by the hour, and office workers are paid on a "salary" basis.

While there are no general prohibitions on paying an employee a weekly "salary" (as long as the employee is paid at least minimum wage), both the federal and state law presume that an employee is entitled to overtime if he or she works more than 40 hours in any given week. The only time an employer does not have to pay overtime is when the employee is "exempt" under state and federal law.

This article will briefly provide a basic background of when overtime is required to be paid and description of these exemptions. It will also offer some practical tips and guidance.

Overtime Payment Generally

The payment of overtime is governed by both federal and state law. The federal standards are defined in the Fair Labor Standards Act and enforced by the Department of Labor. The state laws are governed by statute and regulations enforced by the Department of Workforce Development through its Labor Standards Bureau. For the most part, state and federal law regarding overtime payments and the exemptions are the same. The general rule is that nonexempt employees who work more than 40 hours in any work week must be paid overtime at the rate of at least 1.5 times the employees' "regular" hourly wage. The "work week" does not have to be the calendar Sunday to Saturday, but it does have to be a consistent work week of seven days.

Averaging of two or more weeks within a pay period to avoid paying overtime is not allowed. For example, if an employee works 20 hours in the first week of the pay period and 60 hours in the second week, the employee still has 20 hours of overtime in the second week. (Note that public employers such as police and fire departments, and certain health care employees have exceptions to the rule that overtime is required after 40-hour per work week.)

The overtime payment must be based on the employee's "regular" hourly rate. This August 2001 generally means all compensation to the employee such as the per hour wage plus commissions, bonuses and shift premiums. So if an employee makes $8.00 per hour, gets a weekly bonus of $100.00 and works 50 hours in a week, the "regular" rate for determining overtime is $10.00 per hour, not $8.00.

$8.00/hour
x 50 hours
= $400.00
+ $100.00 bonus
= $500.00
÷ 50 hours
= $10.00/hour

The employee in this example is paid $150.00 in overtime ($10.00/hour x 1.5 overtime multiplier x 10 hours of overtime). Premium pay under union contracts, pay for time not worked such as vacation or sick time and contributions to pension funds, among other exceptions, are not included in calculating the "regular" rate.

Exemptions to Overtime Payments

If simply determining how to pay overtime was not difficult enough, there is also the issue of to whom an employer is required to pay overtime. As noted, employers should not accept the concept of "white collar" salaried employees being exempt from overtime merely because they work in an office and are paid a set salary each week.

Rather, the employer must look to the specific exemptions under state and federal laws. This article will briefly outline five of these exemptions: 1) executive, 2) administrative, 3) professional, 4) outside sales and 5) certain IT/IS employees. The first three (executive, administrative and professional) are to be paid on a salary basis for all hours worked in a week. The outside sales and IT/IS employees can, but do not have to be paid on a salary basis.

Executive Employees. An executive employee is someone whoseprimary duty (i.e., more than 50 percent of his or her time) is spent managing an enterprise, department or subdivision of the employer. The executive employee must also "customarily and regularly" supervise two or more other employees. The executive employee must earn at least $250 per week.[1]

Administrative Employees. An administrative employee mustgenerally spend 50 percent or more of his or her time performing office or other nonmanual work relating to management policies or general business operations of the employer and its customers or clients. The administrative employee must also exercise discretion and independent judgment, and must be paid at least $250 per week.

Professional Employees. A professional employee either performs work requiring scientific or specialized study, or performs original and creative work in a recognized artistic endeavor. The professional employee must consistently exercise discretion and independent judgment with respect to the employee's scientific, specialized or academic knowledge. Professional employees must earn at least $250 per week.

Outside Sales Personnel. These employees are except fromovertime as long as they are normally away from the employer's place of business making sales calls and spend less than 20 percent of their time doing non-sales work. They do not have to be paid on a salary basis.

Certain IT/IS Employees. This exemption includes any employee who is a computer systems analyst, programmer, software engineer, or other "similarly skilled worker," who is paid not less than $27.63 an hour. The employee's "primary duty" must include 1) systems analysis including consulting with users, 2) the design and related tasks of computer systems or programs, based on user- or system-design specifications, and/or 3) the design and related tasks of computer programs related to operating systems.

Employees that do not meet these or the other exemptions must be paid at an overtime rate for all hours worked over 40 in a work week.

Practical Tips

While overtime complaints may not be as topical as discrimination or retaliation complaints, failure to pay overtime can be a serious matter. The DWD may investigate overtime claims for up to a two year period, three years if willful. In civil cases, an employee might be entitled to the unpaid overtime plus a 100 percent penalty and actual attorney's fees.

There are also criminal penalties that can apply. An employee who files a wage claim has a lien against the employer's property located in Wisconsin. The employer's shareholders can also be personally liable for unpaid overtime under certain circumstances.

There are some simple steps an employer can take, however, to minimize the risk of wage and hour violations. The first step is data collection. It is always useful to have a comprehensive list of positions and job duties within any business. In larger organizations, position descriptions and organizational charts are readily available, whereas smaller employers may create a list of positions simply by looking around the office.

The next step is to perform an evaluation of these employees' jobs. Avoiding the "white collar" versus "blue collar" analysis, the employer should look to each position and whether the employee does in fact, for example, manage other employees or exercise discretion. The question to ask is whether the employees truly perform the duties or exercise the judgment required under each exemption.

The final step is implementation. Assuming there is no past overtime due, the employer should create or update position descriptions that are consistent with the exemption requirements, ensure it is keeping the required records of hours worked per week (including stop, start, break times, as well as time spent traveling and in seminars), inform employees of their change in status if necessary and bring its employee handbook and personnel policies up-todate. The agencies that enforce the overtime laws are looking for, among other things, a good-faith effort on the employer's part to voluntarily comply with the wage and hour laws.

[1] Note that the requirements have a "short" and "long" test. The short test isdescribed in this article. The long test for the executive, administrative and professional have additional requirements, but only applies if the employees are paid less than $250 per week. These are the lower salary amounts which have to be paid under the “long test.”

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