

PREVENTING

WAGE AND HOUR MISTAKES



WHILE MOST EMPLOYERS HAVE GOOD INTENTIONS, MAKING ERRORS CONNECTED TO MONEY CAN RESULT IN THE LOSS OF IT IF HR PROFESSIONALS AREN'T CAREFUL.

Wage and hour laws are in place to protect employees and are dictated by state and federal law, so it's important for employers to understand how to avoid costly mistakes and keep their business running smoothly.

SOME OF THE MOST COMMON WAGE AND HOUR MISTAKES INCLUDE:

- Miscalculating overtime
- Withholding overtime because it isn't "authorized"
- Mishandling the tracking of hours
- Failing to recognize which time is compensable
- Ignoring final pay rules
- Misclassifying employees



\$1,333

Average Back Wages for Each Employee

By implementing strategies with limited resources to achieve more impact in fiscal year 2024, the Wage and Hour Division successfully recovered **more than [\\$273 million in back wages](#) and damages for nearly 152,000 workers nationwide**. The most common violators were in the fields of construction, healthcare and food service.

On average, \$1,297 for each employee due back wages. For retail cashiers, that means more than three times what they would earn in a typical workweek. Imagine how challenging it would be if you weren't compensated for three weeks of work. That's the reality for many workers who don't get paid what they have earned.



Exempt vs. Non-Exempt

Employers should take their time filling out new hire paperwork, especially when it comes to classifying employees. Your employees fit into one of two categories, exempt or non-exempt. **This employee classification determines all aspects related to the payment of wages for each individual that are necessary to remain in compliance with wage and hour laws.**

If an employee is exempt, it means he or she is typically paid a fixed salary, not one based on the quality or quantity of work. The term “exempt” means an employee is exempt from the minimum wage and overtime provisions of the law. Exempt employees are often those in supervisory or management positions, but there are [other applicable](#) FLSA exemptions depending on the industry and/or specific job duties. Exempt employees are not entitled to overtime but also generally cannot be paid less than the agreed-upon salary.

Exemptions don't apply to blue-collar workers who perform repetitive operations with hands, physical skill, and energy.

Employees exempt under the [“white collar exemptions”](#) must meet the following FLSA exempt test:

- Perform exempt duties (as established for each exemption)
- Paid on a salary basis
- Earn at least \$684 per week
- Paid the full, agreed-upon salary for any workweek in which they perform any work (with limited exceptions)

Non-exempt employees are entitled to overtime pursuant to the FLSA. Employers are required to pay time and a half the employee's regular rate of pay when they work more than 40 hours in a given workweek. Non-exempt employees also must earn at least minimum wage for all hours worked. Some states have specific minimum cash wages for tipped employees (if an employee's tips combined with cash wage does not equal the applicable minimum wage, the employer must make up the difference). You can pay non-exempt employees by the hour, on a piece-rate basis, by the day, with a commission structure, any combination of these, or even on a salary basis.

Regardless of the method of pay, the requirements for paying non-exempt employees are:

- Keep track of all hours worked
- Pay overtime when applicable
- Pay at least minimum wage



The misclassification of employees as exempt when they do not meet the qualifications can be a very costly mistake. In a typical wage and hour lawsuit, a non-prevailing employer will end up paying back wages plus damages equal to the amount of the back wages, fees to an attorney to represent them, as well as the employee's attorney fees.

Overtime

Overtime requirements focus on each individual workweek, which can be any fixed and recurring 168 hours (seven consecutive 24-hour periods). Because overtime requirements focus on the workweek, employers can't average hours between workweeks. Thus, if an employee works 38 hours one week and 42 hours the next, the employer must pay overtime for two hours in the second week even though the average number of hours worked during the two-week period is 40. Likewise, even if the pay frequency is something other than weekly (bi-weekly or semi-monthly), overtime must still be determined on a weekly basis.

**Overtime after working
40 hours in a workweek**



**1 ½ times an employee's
regular rate of pay**

Employers must pay employees for all the time worked in a workday. "Workday," in general, means all the hours between the time an employee begins work and ends work on a particular day. Sometimes, the workday extends beyond a worker's scheduled shift or normal hours. When this happens, the employer is responsible for paying the employee for that extra time.

The following are examples of worktime outside an employee's normal shift:

- Waiting for repairs to equipment necessary for work
- Time spent before a shift, preparing for the job
- Waiting for materials to arrive during the workday
- Time spent after the shift, completing unfinished work
- Time spent traveling between worksites during the workday

Employers must use caution when evaluating whether they comply with minimum wage and overtime requirements. Many states have requirements that don't always mirror FLSA overtime rules. Employers must be certain they are complying with the FLSA and state law requirements in every state where they have employees.

Commuting & Travel Time


Depending on the nature of the travel, the nature of the employee's work and the connection between the two, an employee's drive and travel time can be compensable (included in the total hours worked for the week for overtime purposes).

According to federal guidelines, employees are “working” in the following travel scenarios:

- Travel from office to first worksite of the day if a stop at the main office or jobsite is required before starting work for the day
- Travel time minus the normal commute (for example, if an employee's normal commute is 20 minutes and the worksite is an hour away, 40 minutes of the travel time is compensable work time)
- Any travel during a non-exempt employee's normal working hours (regardless of the day of the week)
- Any time spent driving (other than the normal commute), the driver is always working (regardless of the time of day or day of week)

Regardless of the time of day or day of the week, any time (other than the normal commute), an employee is the driver of a vehicle, he or she is considered “on the clock.” However, if the employee is a passenger in a car, plane, train, etc., outside the employee's normal working hours, the time is not compensable unless the employee performs work while riding. Employees are not required to make up time because they traveled during their normal schedule (driving or otherwise). In most cases, meal periods for both drivers and passengers are not paid.

In some cases, an employer may choose to pay for travel time above what is required (not actual hours worked). Employers who do this should have written acknowledgement explaining the hours will not be included as hours worked for overtime purposes. The FLSA dictates employers must pay employees for all hours worked. However, the pay doesn't have to be at the same rate — it must only be at least minimum wage. To help with the expense of overtime, some employers choose to pay drive/travel time at a lower rate than the employee's regular pay rate. When using two different pay rates in a week in which an employee worked overtime, the regular rate is a “blended rate” or “weighted average” of the two rates.

 Look at the following example, which applies to any circumstance where different pay rates apply for different work. It's not specific to travel time.

Matthew worked 48 hours in one week. He spent 39 hours at the worksites @ \$15/hr. and 9 hours driving between worksites @ \$8/hr.

Overtime is always one and a half the “regular rate.” The regular rate is total money earned divided by total hours worked.

- $39 \times \$15 = \585
- $9 \times \$8 = \72
- $\$585 + \$72 = \$657$
- $\$657 \text{ divided by } 48 = \13.69
(this is the regular rate for this workweek)
- Now the \$657 covers the straight time (the “time”) for all 48 hours, so Matthew is now due the additional “one half” for the 8 hours of OT.
- $\$13.69 \times .5 = \6.85
- $\$6.85 \times 8 = \54.80
(this is the amount of OT due for this workweek)
- $\$657 + \$54.80 = \$711.80$
(total gross wages for this week)



Other Types of Compensable Worktime

TRAINING

When it comes to training or meetings, employers must pay non-exempt employees for their drive time and all hours they attend any type of required programs. **If the following four criteria are met, an employee doesn't have to be paid to attend training:**

- It is outside normal hours
- It is not job-related
- It is voluntary
- No other work is concurrently performed

WAIT-TIME

Depending on the industry, some employees have to wait to receive their jobs for the day, wait in a security line, or wait at their place of employment to punch a time clock. Generally, either the employee is engaged to wait (worktime) or waiting to be engaged (not worktime). **Employers should pay employees for their wait time if the answers to the following three questions are “yes.”**

- Does the employer require the activity?
- Is the activity necessary for the employee to perform his or her duties?
- Does the activity primarily benefit the employer?

OUTSIDE OR AFTER-HOURS WORK

Many employers who expect or require their employees to check email or take calls outside of the office may not realize that time is compensable. Does someone monitor your social media pages over the weekend? That's considered worktime, too! Make sure your employees track this type of time with a log so you can pay them appropriately. Depending on whether the employee is exempt or non-exempt, you may be able to pay them a lesser wage for these types of tasks.

If an employee is required to remain on call on the employer's premises, employers must compensate the employee. However, employers are not necessarily required to pay an employee who remains on call at home. An employer could be required to pay employees to be on call, even if off campus, if there are added constraints on the employee's freedom.

Breaks

Federal law does not require employers to offer meal or rest breaks to their employees. However, when employers do offer short breaks (20 minutes or less), the law considers the breaks as compensable work hours. Breaks that last longer than 20 minutes can be unpaid. If employers require employees to take unpaid breaks, but an employee chooses not to, the employer still must pay the employee for the hours he or she worked. However, the employer may choose to discipline the employee for violating a company policy by not taking a break, if such a policy exists. Some states require employees be given breaks, so be sure to double check your state's laws.



Child Labor

When hiring minors, employers must follow specific state rules, especially relating to the child's work schedule. Minors are subject to restrictions on when and how long they can work, as well as the type of work they can perform. The exact restrictions depend on the minor's age. While meal breaks are not a federal requirement, the state of Florida, for example, requires minors not work more than four consecutive hours without a 30-minute uninterrupted break (paid or unpaid).

Here are some of Florida's other limitations on youth:

Minors 14-15 may not work:

- Before 7am or after 7pm when school is scheduled the following day
- For more than 15 hours in any one week when school is in session

Minors 16-17 may not work:

- Before 6:30am or after 11pm when school is scheduled the following day
- For more than 30 hours in any one week when school is in session*

*However, a minor's parent or custodian, or the school superintendent or his or her designee, may waive the limitation on a form prescribed by the department and provided to the minor's employer.

If you are in a state outside of Florida, please refer to your state guidelines.

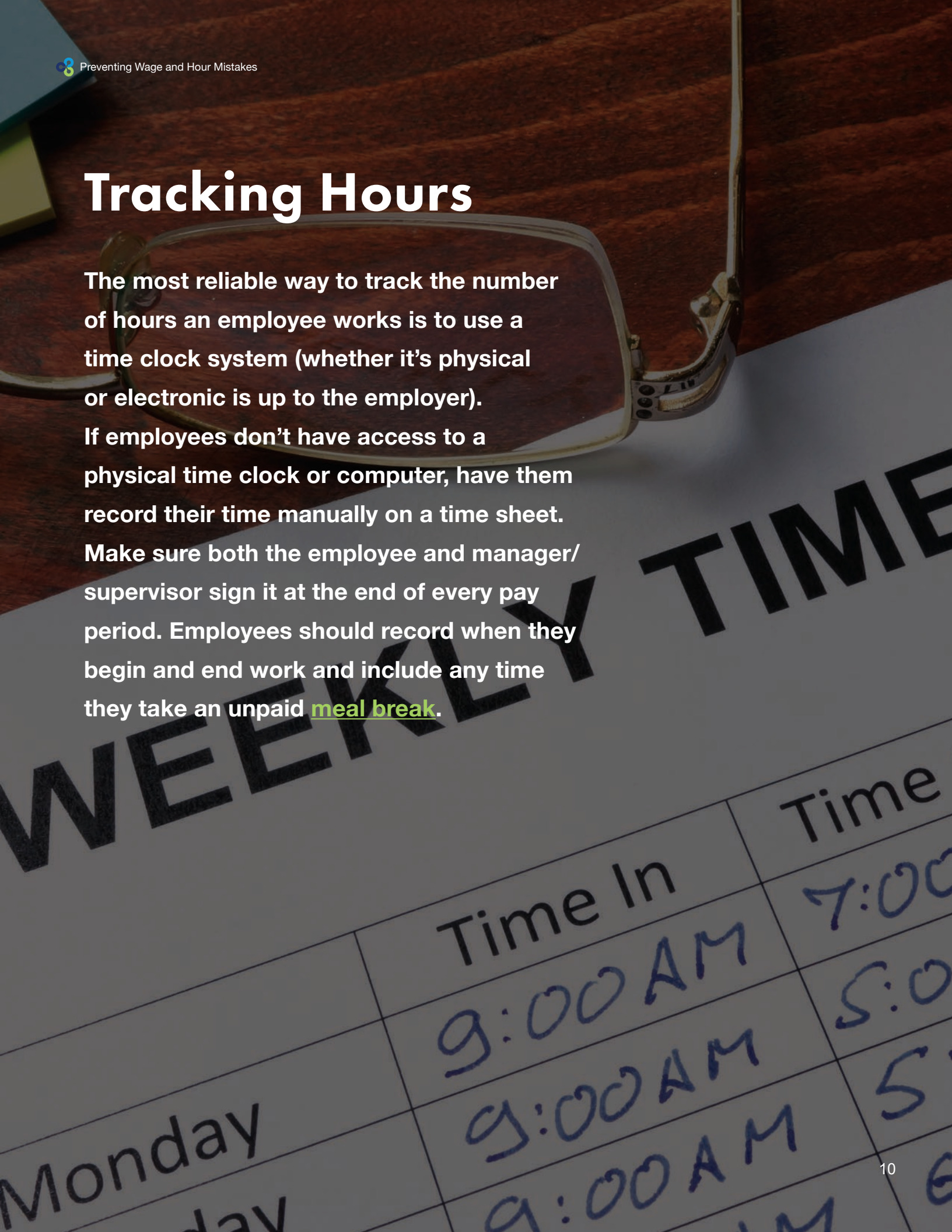


Tracking Hours

The most reliable way to track the number of hours an employee works is to use a time clock system (whether it's physical or electronic is up to the employer).

If employees don't have access to a physical time clock or computer, have them record their time manually on a time sheet.

Make sure both the employee and manager/supervisor sign it at the end of every pay period. Employees should record when they begin and end work and include any time they take an unpaid meal break.



The background image shows a pair of glasses resting on a wooden desk. Below the glasses is a 'WEEKLY TIME' sheet. The sheet has columns for 'Time In' and 'Time'. The word 'Monday' is visible in the bottom left corner. The 'Time In' column contains three entries of '9:00 AM' written in blue ink. The 'Time' column contains three entries: '7:00', '5:0', and '5'. The word 'day' is partially visible at the bottom left.

	Time In	Time
Monday	9:00 AM	7:00
day	9:00 AM	5:0
	9:00 AM	5

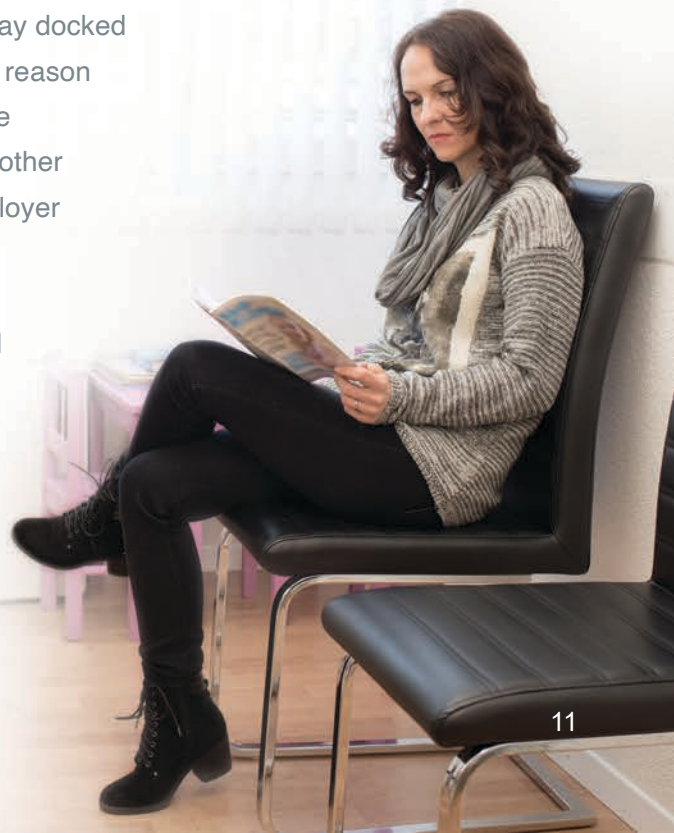
Deductions

For both exempt and non-exempt employees, permissible deductions typically include those required by law (taxes) or by court order (garnishments) and those at the request and for the benefit of the employee (benefits premiums, 401(k) deposits). Aside from those situations, employers generally may not deduct from an exempt employee's pay — with a few exceptions:

- It's the first or last week of employment and the employee does not work the entire week
- An employee is absent from work for reasons attributable to [FMLA](#)
- An employee calls in sick but has already used all of his or her paid sick days or has not yet become eligible for sick time (if the employer doesn't have a paid sick leave plan, time may not be deducted if the employee has worked any day that week)
- An employee takes a full day off for personal reasons
- An employee is suspended for a major safety violation
- An employee is suspended for violating a written company policy which applies to all employees and which relates to workplace conduct (workplace violence, sexual harassment, drugs/alcohol on company property, etc.)

The only instance in which an exempt employee can ever have pay docked in partial-day increments is if he or she misses part of a day for a reason attributable to FMLA. In that case, employers only have to pay the employee for the part of the day he or she actually worked. In all other circumstances, if an employee works any part of the day, an employer must pay him or her for the whole day.

Employers can require employees use vacation, sick, or personal time to cover partial-day absences. For example, if an employee has a doctor's appointment and is three hours late, or if someone asks to leave an hour early to renew their driver's license, the employer can pay them for the hours worked and have them use paid time off to make up the difference. As long as the employee receives his or her full salary, it's legal to combine wages with personal or sick time.



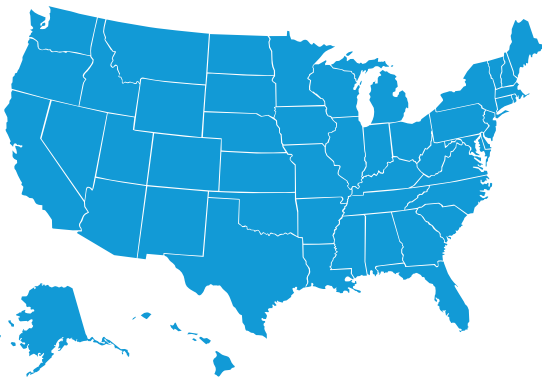
Deductions — Non-Exempt Employees

With the exception of permissible deductions previously referenced (taxes, garnishments, benefits), under the FLSA, deductions from a non-exempt employee's pay generally cannot take their wages below minimum wage — not even if they sign a document authorizing it. Employees may not sign away their rights under the law. As such, if an employee only makes minimum wage, an employer may not take any deductions. Exceptions to this are for advances in pay and/or loans paid to employees.

Because it's considered an employer convenience to deduct for items like uniforms, tools, or property damage, the employee must authorize all such deductions in writing ahead of time. In fact, all instances that necessitate deductions from pay should be in writing including policies, procedures, acknowledgements of receipt of property, agreement to repay, authorization for deductions, etc.

Here are some suggestions for handling deductions and maintaining compliance:

- If an employer needs to deduct a large amount of money from an employee's pay, but the deduction would take the employee's pay below minimum wage, the employer can arrange for smaller, periodic deductions. For example, if an employee lost a tool valued at \$100, the employer could deduct \$25 over four pay periods.
- An employer may make deductions periodically in small increments to collect a deposit for some type of loaned equipment. For example, if an employee uses a company laptop worth \$500, the employer could take a \$50 deduction out of the first 10 paychecks. Once the laptop is returned (upon termination), the deposit can be refunded. If the employee does not return the laptop, the employer has already collected the cost of replacing it (or at least more than what the employer could deduct from the final paycheck).



Many states have restrictions on the types of deductions employers can take from employees' pay as well as the terms under the deductions can be made. [Click here for the rules in your state.](#)



Garnishments

A wage garnishment is a court order that requires an employer to withhold a portion of an employee's wages to pay part of that employee's outstanding debt. Federal and state regulations determine how much an employer should withhold from an employee for a court ordered garnishment or tax levy each pay period. Wage garnishments are not voluntary.

It can sometimes be awkward for employers to handle garnishments. After all, most are very personal. It's important to make sure to respond to a writ of garnishment once it's received. If employers ignore or miss the deadline, the employer could end up in court — and worse, be held responsible for the employee's debt.

It's the employer's responsibility to know the maximum amount that can be garnished, which varies by state. On a federal level, the Consumer Credit Protection Act (CCPA) protects the employee's wages. The CCPA says the garnishment can be up to either 25 percent of their earnings, or 30 times the current federal minimum wage, whichever is less. However, certain types of debt, like student loans and child support, have different withholding limits.

The CCPA prohibits employers from terminating or disciplining an employee for their first wage garnishment. In most states, withholding must begin within the pay period specified by the writ's date of service. Employers must continue withholding until they receive an order to stop. Otherwise, there are stiff penalties to pay.

Tips

A tipped employee is defined as an employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips.

The federal minimum wage for tipped employees is \$2.13 per hour, although each state may set their own minimum standard above the federal minimum. To remain compliant with the FLSA, an employee needs to receive a “tip credit” (amount made in tips) to add up to at least the federal minimum wage.

For example, tipped employees paid \$2.13 must receive \$5.12 in tips to equal the federal minimum wage of \$7.25 an hour.

If an employee’s cash wage plus their tips do not equal at least minimum wage, then the employer is responsible for making up the difference. An employer of tipped employees must notify those employees of their hourly cash wage, the amount of the tip credit you are claiming, that they are required to report all tips received, and the rules regarding tip pooling, if applicable.

TIP POOLS

Employers that collect tips to facilitate a mandatory tip pool must fully redistribute the tips within the pay period. If the employer pays a full minimum wage and takes no tip credit, then employees who are not tipped may participate in the tip pool. Employers may not keep employees’ tips under any circumstances.

Managers may not receive tips from the tip pool; however, they are not prohibited from contributing to the tip pool. The only circumstances where a manager or supervisor may keep a tip is when they receive the tip from customers directly for services that the manager or supervisor directly and “solely” provides.



DUAL JOBS

An employee who performs two or more jobs at the same employer is considered holding “dual jobs.”

In this instance, if one of those jobs is part of a tipped occupation and the other is not then the employee may only receive a tip credit when performing work that is part of the tipped occupation. Tip-producing work is considered any work performed that provides service to customers for which the tipped employee receives tips and that directly supports work that is performed and/or assists tip-producing work.

OVERTIME PAYMENT

For tipped employees making \$2.13 an hour, overtime for tipped employees cannot be calculated by taking one and half time \$2.13. Instead, overtime is calculated by the following calculation:

- $\$7.25(\text{minimum wage}) \times 1.5 = \10.88
- Minus \$5.12 (tip credit) = \$5.76
- $\$5.76 \times 10 \text{ hours of overtime} = \57.60
- The employee would receive \$57.60 in overtime wages in addition to their hourly wages, \$85.20 (40 hours x \$2.13) for a total of \$142.80.

The Last Paycheck

When terminating an employee, employers cannot withhold the employee's last paycheck for any reason. Federal law mandates the wages are due on the next regular payday for the covered pay period. An employer may however be able to deduct approved expenses from the final pay of a non-exempt employee depending on the language of your state's law.

An employer has the best chance of recovering funds for equipment damage if there is documentation indicating an employee received the equipment in good, working condition. If the law in the employee's specific state prevents the employer from deducting the amount from the employee's final paycheck, the employer can try to recover the loss by invoicing the employee, taking him or her to small claims court, or even filing a police report for theft.

One other thing to consider with an employee's final paycheck is vacation pay. Some states consider it a form of wages. Therefore, payment for vacation an employee has remaining upon termination could need to be included in his or her final paycheck.



Pay Periods

In some states, employers are free to choose a pay schedule for their employees so long as it's consistent. In other states, minimum standards for how often employees must be paid, are set. Either way, having a semi-monthly, bi-weekly or more frequent pay schedule is a good practice.

- From an employer's perspective, the length of a business's pay period is associated with the business's costs and cash flows. Employers have to consider how often to process payroll, print and mail checks, and pay bank fees for direct deposit if applicable.

578.41

TO DATE

NI'able Pay
SMP
SSP
NI Employer

Total

Net Pay

5576.90

0.00

Payment Methods

There are several different ways to pay employees, and the method an employer chooses may differ based on industry. Direct deposit is the most common way to pay employees because it's convenient for all parties involved. If employees choose to participate, they simply input their banking data when they're hired and their wages are deposited automatically into their accounts on payday. Certain payroll software has direct deposit incorporated, but if employers don't use a software, there may be a bank fee for each direct deposit.

Payroll cards are another electronic payment option. A pay card allows employers to put wages directly onto a prepaid card, having nothing to do with an employee's bank account. There are card fees involved for the employer, but even with the added costs, pay cards may still be a cheaper option than printing paychecks.

Some employers prefer to print paychecks, even though it requires a handful of supplies. The downside for employers is that printing the checks is time-consuming. It also creates a problem when paychecks get lost or stolen or delay in delivery due to inclement weather.

No matter which way employees are paid, it's best to provide them with a pay stub each pay period. In many states, it's a requirement. The stub shows the gross pay, amounts paid for taxes and benefits, and deductions, which is useful if there's a mistake. States that require pay stubs have various requirements about what information they must contain.

Frequently Asked Wage & Hour Questions

I pay all my employees a salary. Do I still have to pay overtime?

Paying employees a “salary” is simply a method of pay (just like hourly, commissions, piece-rate, etc.) It does not mean the employees are exempt from the overtime requirements of the law.

How do I calculate overtime if I pay different rates for different work?

Overtime is one and one half times the “regular rate.” Determine the regular rate by adding up all the straight time pay and dividing it by the total number of hours worked. Once you’ve calculated all the straight time, you just pay the extra half-time for the OT hours.

See page 6 for an example.

We have a policy that requires employees to get authorization in advance to work overtime. If they don’t get authorization, but still work overtime, do we have to pay it?

Yes, by law, employees are entitled to overtime if they work more than 40 hours in a workweek. Your policy will not supersede the law. That said, you could use corrective action with the employee for the policy violation and let them know that continuing to violate the policy could lead to termination of employment.

What is a discretionary bonus vs. a non-discretionary bonus?

A discretionary bonus is given based on the sole judgment of the employer. It is up to management to decide whether to pay the bonus, the bonus amount, and which employees receive it. The bonus is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly. Discretionary bonuses are excludable from the regular rate of pay.

Continued...

In contrast, a nondiscretionary bonus accrues automatically as a function of policy or ordinance, based on a pre-determined formula such as individual or group production bonus; bonus for quality and accuracy of work; attendance, safety or retention bonus; commission payments based on a fixed formula. Such bonuses are nondiscretionary because the employees know about and expect the bonus. You can learn more about bonuses and calculating pay here: www.dol.gov/agencies/whd/fact-sheets/56c-bonuses

If I pay my roofers a piece-rate, do I still have to track how many hours they work?

Yes, employers are required to track the number of hours worked by non-exempt employees even if they're not paid by the hour. This is because employers must still ensure the employees make at least minimum wage for all hours worked and are entitled to overtime if they work more than 40 hours in a workweek. The only way to comply with those two provisions is to track the number of hours worked.

Can I require my employees to take breaks?

Yes, you can require your employees to take breaks. It's common for employers to have a nine-hour workday and require a one-hour break to avoid unnecessary overtime. Employers must pay employees for breaks less than 20 minutes in duration; breaks 20 minutes or longer can be unpaid.

My construction workers might work at two or three different worksites during the same workday. Do I have to pay for the time spent driving between sites since they're not actually doing any work?

Yes, employers must pay employees who drive from worksite to worksite. Employers may choose to pay a lower rate for the travel time, as long as it is at least minimum wage.

My employee damaged company property. Can I deduct the repair cost from his paycheck?

Most states require advanced, written authorization to make deductions from employees' wages and no such deduction can take the employee's wages below minimum wage.

PREVENTING WAGE AND HOUR MISTAKES IS KEY TO AVOIDING COMPLIANCE ISSUES AND FINES, AS WELL AS RETAINING YOUR MOST TALENTED EMPLOYEES. When it comes to the FLSA, the details matter. If an employer ignores or forgets something, it can cost thousands in fines and lost productivity. Employers should focus on classifying employees correctly, paying them properly, determining compensable worktime, and tracking time actually worked.

Small companies tend to be more at risk for wage and hour errors because the main players (employers, managers, administrators) aren't necessarily trained or experienced in HR or law. Ask for help, since a few simple mistakes could lead to a lawsuit.

IF YOU HAVE QUESTIONS ABOUT CLASSIFYING YOUR EMPLOYEES, OVERTIME, DEDUCTIONS, OR ANY OTHER WAGE AND HOUR TOPIC, CONTACT ONE OF THE HR CONSULTANTS AT FRANKCRUM TODAY.

Contact Us!



www.FrankCrum.com
800.277.1620