

How to Avoid Costly Overtime Violations

By Glenn Israel | November 3, 2014

Failing to properly track and pay for overtime work can be very costly. Wal-Mart settled an overtime claim in 2012 for \$5.29 million; Morgan Stanley settled a claim for \$4.2 million in August; and the Commonwealth of Massachusetts agreed in October to settle an overtime claim for \$21.5 million. In my practice here in Maine, I have worked on a number of overtime cases that settled for hundreds of thousands of dollars.

The overtime laws are strict. There is no requirement to prove that the employer intended to violate the law. A simple mistake can result in liability. There are three things every employer should do to avoid overtime law violations: know the law, conduct a self-audit and train your managers and supervisors.

Know the law

All non-exempt employees must be paid one-and-one-half times their regular rate of pay for all hours worked in excess of 40 in any work week. This simple statement contains a number of terms that must be understood in order to assure compliance with the law.

- **Employees:** Employees are covered by the overtime law, but independent contractors are not. The difference boils down to the degree of control exerted by the employer over the details of the performance of the work.
- **Non-exempt:** The overtime laws contain exemptions for employees who are paid a weekly salary and perform duties that fit within the categories of executive, administrative, professional, outside sales and computer professional.
- **Regular rate of pay:** Calculating an employee's regular rate of pay requires the employer to know how many hours the employee worked and how much the employee earned for that work. There are rules regarding what should be counted as "working hours" and what payments to an employee are considered earnings. For example, there have been lawsuits over whether employees are "working" when they are putting on their protective clothing at the beginning of their shift.
- **Work week:** A work week is a period of seven consecutive days. Overtime pay must be calculated on a week-by-week basis. A common violation of the law is to calculate overtime based upon a two-week pay period, i.e., only pay overtime for hours worked in excess of 80 in a two-week period.

Conduct self-audits

Put yourself in the shoes of the U.S. Department of Labor investigator who has just received a complaint from one of your employees about an overtime violation. Review your employee classifications for misclassified independent contractors or exempt employees. Check your timesheets to make sure they are complete and accurate. Look at time-keeping and overtime pay policies to make sure they comply with the law.

Train your managers

All employees need to have a basic understanding of the overtime laws. Managers and supervisors also need to understand the difference between exempt and non-exempt employees, and the importance of keeping accurate time records for non-exempt employees. All new employees should receive training as part of their orientation.

Documents that you should have include job descriptions, time-keeping and payroll procedures, a written description of which employees are entitled to receive overtime pay and how that pay will be calculated and procedures for resolving questions or disputes regarding an employee's paycheck.

Overtime violations can be costly, but they also can be avoided through vigilance and training. Because the overtime laws create strict liability regardless of intent, strict compliance is the best approach.

The Department of Labor website, www.dol.gov, contains a number of fact sheets that help employers to understand overtime procedures. Should issues arise, it is advised to consult with legal counsel for guidance and questions.