



Forcing Nonexempt Employees to Work Off the Clock (without pay) Violates the Law

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A recent appellate court case from the Fifth Circuit Court Appeals¹ is a stark reminder that employers are ultimately responsible for ensuring that nonexempt employees accurately record all time worked and are fully compensated for all hours worked regardless of supervisor directives to exclude off-the-clock work. While it is permissible for an employer to require nonexempt employees to record their work hours each day, the employer is ultimately responsible for ensuring that nonexempt employees accurately report all work time—with no excuses or directives to perform off-the-clock-work. In the private sector, compensatory banks are not permissible.²

As an attorney who has close to 30 years of experience defending wage/hour claims, I continue to be baffled by: 1) the perpetual myth that paying an employee a fixed salary qualifies the employee as exempt from the overtime obligations imposed on employers under the Fair Labor Standards Act, of 1939 (“FLSA”); and 2) the threatening of employees that they will lose their jobs if they report off-the-clock-work that is forced upon them by their supervisors. In this day and age (to quote a cliché), there is no excuse for noncompliance with the FLSA. Oh my..... Guess what? New wrinkle..... you guessed it-remote work. Now what?

Required Time Keeping Requirements – No change in this Pandemic (post hopefully) World

Under the FLSA, the time record keeping requirements imposed upon employers have not changed—only the environment from where an employee works may have changed. Regardless of physical location, the obligations regarding record keeping regarding employee work hours are the same. Accurate time records for actual work time³ for nonexempt

¹ *U.S. Dep't of Labor v. Five Star Automatic Fire Prot., L.L.C.*, No. 19-51119 (5th Cir. Feb. 9, 2021).

² Compensatory banks are permissible in the public sector only. A compensatory bank allows a public employer to permit employees to save overtime hours for future use as paid time off so long as the banked hours are based upon time and one-half.

³ Worktime excludes employer closures, holiday, sick or vacation days.

employees MUST be kept. The records can be hand-written, but an electronic time keeping system is best as it provides the greatest accuracy.

While paying a fixed salary is an essential part of the two part test for salary-exempt status under the FLSA, it is not the determinative aspect of the test. The most important part of the two-part test is the second part, i.e. the duties performed by the employee must qualify for a salaried-exempt classification, e.g. a manager who supervises two or more full-time employees, a highly compensated employee (\$107,432 per year or more), a learned professional (doctors, lawyers, teachers, and accountants) or an owner of the business.

Wage hour violations are expensive. Not only is the nonexempt employee entitled to overtime pay at time and one-half of the employee's regular rate of pay, but the employee is also entitled to liquidated damages in an amount equal to the unpaid overtime. There is more. The employee or former employee is also entitled to attorney fees. Note that the attorney fee provision benefits only the employee under the FLSA. Even if the employer wins, the employer loses as it will not be able to recover its cost of defense.

With the recent changes in the top echelon at the United States Department of Labor ("DOL") and recent actions taken by the DOL, e.g. the repeal of the Payroll Audit Independent Determination program that allowed employers to self-report violations and avoid payment of liquidated damages and attorney fees⁴, the DOL is signaling enforcement will be the priority.

Now would be a good time for employers to audit and review pay practices within their organizations.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

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⁴ <https://www.dol.gov/newsroom/releases/whd/whd20210129>.