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NEWSLETTER

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Common Overtime Mistakes To Avoid

There are many ways to run afoul of overtime laws. Below are some of the most common — review them to ensure that you're always in compliance.

Misclassifying exempt and nonexempt employees

Under the Fair Labor Standards Act, exempt employees do not have to be paid overtime when they work more than 40 hours in a workweek, but most of them must receive a salary of at least \$684 per week. When classifying employees as exempt, be sure to review the U.S. Department of Labor's guidelines.

If an employee does not meet the "exempt" threshold, then they are nonexempt and must receive overtime pay for hours worked over 40 in a workweek.

You might need to consider state law as well. A few states — such as California and New York — have their own overtime exemption laws.



Assuming all salaried employees are exempt

If a salaried employee does not meet the FLSA or state criteria for “exempt” status, then they are nonexempt and must receive overtime pay for overtime hours worked.

Improper application of standard overtime rules

Under the FLSA’s standard overtime rule, employers must pay overtime hours (i.e., work hours exceeding 40 in a workweek) at 1.5 times the employee’s regular rate of pay.

Many states have standard overtime rules, which may or may not differ from the FLSA’s. When both FLSA and state overtime laws apply, employers must use the law that favors the employee the most.

Providing compensatory, or comp, time in lieu of overtime pay

The FLSA forbids private sector employers from using comp time/paid time off as a substitute

for overtime pay. This practice is also illegal in most states. Where comp time is forbidden, the employee must receive overtime wages for overtime hours worked.

Inaccurate calculation of “regular rate of pay”

Overtime rate is based on the employee’s regular rate of pay, so it’s crucial that the regular rate of pay is correct. The FLSA defines regular rate of pay as “all remuneration for employment paid to, or on behalf of, the employee.” In addition, the FLSA excludes certain types of payments from the regular rate of pay calculation, including unused paid leave, discretionary bonuses, payments made in the form of gifts, and business expense reimbursements. If a payment is not excluded, then you must include it in the regular rate of pay calculation.

Not paying unauthorized overtime

Under the FLSA, “Work not requested but suffered or permitted is work time.” Basically,

if you know or have reason to believe the work was done, then you must pay for the time worked — whether or not you authorized it. This includes unauthorized overtime worked by on-site and remote employees.

Missing other applicable aspects of overtime pay

Depending on the nature, structure and location of your business, you may need to consider other overtime rules, such as:

- Weighted average overtime for employees who work multiple jobs at different rates.
- Overtime premiums for employees who work outside normal business hours, such as on Sundays or holidays.
- Fluctuating workweek method, which allows employers to calculate overtime pay at 0.5 (instead of 1.5) times the regular rate of pay.

Be sure to work with a professional to ensure you follow all the rules.

Should You Pay an Employee Who Resigns With Two Weeks’ Notice?

An employee who resigns with two weeks’ notice may think they are doing you a favor. But in fact, it can be a payroll headache, especially if you listen to some of the misinformation you may have heard about two-week notices. For example, you may have heard a rumor that you don’t need to pay employees for their last two

weeks of work. That’s not true; as an employer, you must pay your employees for all the time they have worked. Therefore, if an employee resigns with two weeks’ notice, you must pay them for any work that they complete within that two-week period. Here are some other questions you might have about this tricky situation:

Can you let the employee go early and not pay them for the two weeks?

In the vast majority of states, employment is at will, meaning employees can be terminated at any time for any reason. Therefore, unless an employment contract says otherwise, employers can typically

terminate an employee before their two-week notice ends. But even if you let the employee go early, you must still pay them for any work done during those last two weeks.

Additional considerations:

- If you let the employee go early despite their two-week notice, the termination will become involuntary, which may qualify the employee for unemployment insurance benefits that they might not have gotten otherwise.
- If the employee gives two weeks' notice as required by company policy and you terminate them early, the employee may use the company policy to argue during litigation that they are entitled to two weeks' pay.
- Remaining employees may view you poorly if you let employees go before their two-week notice ends. They might not see any upside to giving you two weeks' notice if they decide to resign one day.

Should you pay unused paid time off to employees who give two weeks' notice?

Yes, if a statute, your company policy or an employment contract says you should.

In some states, employers must pay out unused vacation to departing employees, regardless of whether the employee was discharged or resigned with notice.

Other states require employers to defer to company policy. Commonly, employers require departing employees to give two weeks' notice in order to receive unused vacation pay. If the employee fails to provide two weeks' notice, they will not receive the vacation payout unless a statute or an employment contract requires it.



Generally, state law does not require employers to pay out unused sick time to departing employees. But if you provide one PTO bank instead of separately allocating vacation, sick and/or personal time, then the state may require you to pay out unused PTO upon termination.

When are final wages due to employees who give two weeks' notice?

Final wages must be paid by the state-mandated deadline. In many cases, if the employee resigned with notice, final wages are due by the next scheduled payday. State laws vary, so be sure to check your specific state regulations.

If the state is silent on the matter, you must still pay the departing employee any wages due within a reasonable time frame — usually by the next scheduled payday.

Are the rules different for exempt employees?

Employees who are exempt from overtime under the Fair Labor Standards Act must receive their full pay for any week in which they do any work — unless there's a legally permissible deduction; for example, you can legally dock an exempt employee's pay if they did not work the entire week in their first or last week of employment.

The bottom line? Get up to speed on regulations before anyone leaves so the transition goes smoothly.

Is This Your Situation: Deciding Whether Someone Is an Employee or a Contractor

Many companies use both employees and freelancers, and this is fine, but the IRS doesn't treat them as interchangeable — there's no mixing and matching. Anyone you pay is either one or

the other and subject to the proper tax treatment.

So which is which? You're probably wondering about the functional difference between an

employee and a contractor. So, let's start with employees. The IRS defines an employee relationship as one in which you, the employer, "can control what will be done and how it will be done." Employees

are generally given training, resources and benefits. They have a portion of their pay withheld for taxes.

What Determines Independent Contractor Status?

For the most part, independent professionals who offer their services to the public are considered independent contractors. This description includes doctors, accountants, lawyers, photographers, designers and writers. Unlike in an employee relationship, you as the payer relinquish a portion of control over the contractor's time. You still dictate fulfillment of an agreed-upon task, but you are not in control of the contractor's means of completion.

Independent contractors pay self-employment tax on their earnings, while employees typically have taxes withheld.

What Are Statutory Employees and Statutory Nonemployees?

These terms can be confusing, and although there's a good chance you won't be dealing with them, you may hear the terms. Just so you understand the concepts, contractors may be considered statutory employees

if they fall within various IRS specifications. Social Security and Medicare taxes may be withheld if a statutory employee a) performs all service personally, b) does not have an investment in the work equipment and property, and c) performs the work on a continuing basis.



Statutory nonemployees are usually direct sellers or real estate agents. They are self-employed for tax purposes if a) their wages are related to their output rather than the number of working hours and b) they work under a written contract specifying that they are not employees.

Common Law

There are three common-law categories to weigh when determining whether your worker is an employee or a contractor: behavior, financials and type of relationship. Do you have control over how the worker does the job? What are the financial agreements? Are you providing additional benefits? These types

of questions help paint a bigger picture and eventually lead you to a final answer.

Withholding and Record-keeping

Once you've sorted out who is who, it's easy to figure out how to treat each group. For employees, you must withhold income, Social Security and Medicare taxes. You will deposit and report the withholdings in accordance with the IRS guidelines in Publication 15, Employer's Tax Guide. Each year at tax time you issue a Form W-2 to each employee.

For independent contractors, on the other hand, you do not have to withhold taxes. And instead of the Form W-2, you send each one a Form 1099-MISC.

Even experienced managers may have trouble distinguishing between an employee and a contractor. So please don't hesitate to give us a call about any current or contemplated worker relationships. We'll be happy to help you sort everyone out according to IRS guidelines.

Don't Forget the Introverts on Your Team: They May Be More Valuable Than You Think

Leading in a remote work environment is very different from leading in a physical office. Businesses have been working remotely for a while now, and leaders have more clarity around what does

and does not work. Large virtual meetings are a good example. They tend to get awkward once the work agenda is completed. Smaller meetings work much better because there is more opportunity

for the attendees to interact differently and become more engaged.

By taking a step back and thinking about the past few meetings from the perspective of those

who spoke up at these meetings, leaders may find they have been dismissing some team members without giving it much thought. In all likelihood, the extroverts on the team participated the most simply because they enjoy being seen and heard.

But what about the others on the call who did not contribute much, if at all? These are the introverts. It is easy to forget they are there because they are quiet. They listen more than they speak. But dismissing their contributions might be a big mistake because one of their biggest attributes is analytical thinking — a critical skill for any team. When they do participate, their contributions generally are meaningful.

Often, introverts do not participate because they are afraid others will disagree or think their ideas have no merit. Speaking up is outside of their comfort zone. When they are engaged in a one-on-one or small-group setting, however, they can provide excellent input.

Company leaders need to understand what makes these team members tick. It is clear they do not

promote themselves the same way extroverts do. As a result, their work is accepted without fanfare or recognition even if they secretly want to have their contributions acknowledged.

Ultimately, introverts may be overlooked when it comes to promotions because they are viewed as lacking leadership skills. But that is not accurate. Some of the leadership skills introverts have are the very skills extroverts are trained to have, such as listening and empathy.

Introverts are natural team players who look out for the good of the team and the project in a different way than do extroverts. The pleasure they get from success comes from being on a winning team. It is about the “we” rather than the “I.” They tend to work independently without much supervision, making them even more invisible.



Ironically, their positive traits are part of the reason they are often overlooked for promotion, especially when their competition for the new role is an extrovert who is always visible.

Today’s small virtual meetings are a good place for company leaders to assess the traits and contributions of the introverts on their team. They may find that they have been overlooking team members with leadership potential.

How to Fire Employees Legally and Compassionately

Firing employees is always hard. Perhaps that is why Google fired 12,000 employees via email one night, immediately locking them out of company devices. Most employers do not fire employees that way.

Most of the time, employers make the difficult decision to let someone go on an individual basis. For most, it is a wrenching

experience that, first, requires preparation and, second, must be done in a way that protects both the organization and the person doing the termination interview. To achieve these two objectives, companies need guidelines that must be followed before letting an employee go. These guidelines should include the following:

Legality

Keep in mind that even though most states follow some version of “at-will” employment laws, which does not mean someone can be fired at any time for any — or no — reason, it is not absolute. There are many exceptions to at-will laws, such as retaliatory or discriminatory action and breach of contract.

The reason for termination must be, one, legally acceptable under federal, state and local laws, and two, true and verifiable. Under federal law, it is illegal to fire anyone based on any status protected by equal employment opportunity laws, such as age, religion, disability, sexual orientation and gender (including gender identity and gender expression).

Reasons such as poor performance or unexplained absences generally are acceptable. It is also acceptable to fire someone if they have committed illegal or criminal activities.

Company Policies

Every company handbook should contain the company's firing policies. This means detailing the reasons disciplinary measures will be taken, outlining the steps in the process and stating what actions will result in termination.

The handbook should also provide guidelines for probationary periods. In general, most states permit employers to fire probationary employees during the probationary period.

Employers need a plan that reinforces the company's hiring policies. Guidelines for this process include:

- Investigating the event. Sometimes the event resulting in a termination needs no further investigation; for example, if constant lateness can be substantiated by timeclock records. However, if the event is more complicated, such as allegations of discrimination, sexual harassment, retaliation or threats of violence, the employer must gather supporting evidence, such as interviews with others who witnessed the event. It is important to be prepared in the event the employee files a lawsuit against the

company after they are terminated. Note that an employee who discriminates against, sexually harasses, or threatens violence against another employee may be fired immediately.

- Documenting violations. Employers should document infractions in writing, sign it and have the employee acknowledge they have seen the documentation. The signed document should be stored in the employee's personnel file.

- Creating a performance improvement plan. Create a performance improvement plan that gives the employee the opportunity to rectify their errors. Discuss this plan with the employee and have them sign off on it.

- Recordkeeping. Store any documentation relating to the person in their personnel file so the company can support



any claims arising from a lawsuit or denial of a claim for unemployment benefits. (Note that depending on state law, unemployment insurance may be denied for reasons of misconduct.)

Firing interview

Firing an employee is stressful. It is a best practice to have another person present during the meeting, preferably someone from HR. In addition, be sure to do the following:

- Keep the meeting short and factual.
- Give the terminated employee all relevant information about, one, their benefits, including COBRA, severance package, etc., and two, leaving the building, returning company-owned items, etc.

- Be respectful of what the employee has to say.

Layoffs

Layoffs are different from individually firing an employee, but they too need to be planned. Even when layoffs are necessary, no company wants the process to be perceived as negatively as Google's was.

It is important to get professional advice to be sure you are complying with federal, state and local laws.

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