

“Exempt” from What? Common Overtime Pay Myths

If I have a midlife crisis and start suing employers, I'll start with overtime pay cases. The law is misunderstood, attorney's fees are automatic, back pay can be three years and violations are everywhere you look. It's one of the most common claims brought by current and former employees against employers and each problem can lead to other problems. That's why you need to know enough about exemptions and overtime to have a conversation with your key team members or advisors about your risks.

Myth

If the role is important then it is exempt from overtime pay, right?

If an employee, intern or other person agrees to accept what and how I pay them in writing, then our contract controls, right?

If I am fair with people and pay them a market rate (or more), pay them for time they don't work, and give generous time off, I'm OK when the regulators come calling?

Come on now, are you saying that a highly paid, highly skilled six-figure employee may be due overtime pay because they do not fit within some box defined by the feds in the 1930's?

Well, what if I decided to pay everyone minimum wage and let them make their real money on bonuses or commissions? That gets around overtime, right?

Look, I hear you, I am just going to run the risk because the employee likes it how it is and I like it, too. They even get extra benefits as a salaried person. So what if they don't meet some "duties test" and I don't pay overtime?

I don't control what they do off-work and I don't owe them any pay for it either.

If they are on a full commission basis, I have no minimum wage or overtime obligation?

Fact

NO. Importance, your preference, the employee's preference, what your competitors do: none of it matters. What matters is what the employee does, whether the rules say the person can be exempt from overtime and how you pay them.

NO. Wage and Hour law specifically says an employee may not agree to waive the requirements of the law.

NO. There has never been a federal investigator that cared one bit about whether you are a generous employer or not. The **ONLY** things that matter are the rules.

YES. Thank you for letting me say "yes" to one of these points.

NO. Wages are broadly defined and you must count all wages when assessing the overtime rate due. Almost all bonuses, incentives, shift rates, carrots, sticks and cash must be counted.

Well . . . the so-what may not involve the employee who never complains. The so-what may come from another employee (or recently fired person) who makes a complaint and sparks a wider investigation into the workplace.

WRONG. Minimum wage (or the promised wage) plus overtime is owed for "all hours worked" by a non-exempt. If you reasonably should know the hours were worked (regular emails, taking calls at home) then you owe or must prevent the work.

WRONG. Only certain outside sales roles have these exemptions. Inside sales do not.

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MY PREDICTION:

Each year, 35,000 Americans call the U.S. Department of Labor's (USDOL) Wage and Hour Division to complain about their employer. Once an investigation is announced, the die is cast and the focus becomes "what you owe". It is not an exaggeration to say that most workplaces have violations, and many large employers have large violations. Your workplace is a target for the growing investigative team at the USDOL and their new network of local private attorneys willing to take cases.

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HOW TO PREPARE:

Make sure you have excellent job descriptions describing the actual, current duties of the role. Make good estimates of the time spent on each duty and have them reviewed by someone with the experience to challenge your judgment if the rules and the facts are in potential conflict. This can be done internally with the right skill set. There are many ways to cure violations caught early. CAI and other professional advisors with workplace experience can help. As part of CAI membership, our advisors are waiting for your call to discuss your concerns.

Contact me directly if I can help you or your team.

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