

FPHRA 79<sup>th</sup> Annual Conference

Saturday, August 1, 2015

# EEOC & FLSA Overview

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# EEOC OVERVIEW

- EEOC BACKGROUND
- THE CHARGE
- THE INVESTIGATION
- MEDIATION
- POSITION STATEMENTS
- THE DECISION
- PRACTICE POINTERS

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# GETTING TO KNOW THE EEOC...



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# EEOC BACKGROUND

- Equal Employment Opportunity Commission (“EEOC”) is an independent federal agency charged with eradicating discrimination in employment
- EEOC possesses discretion in putting a stop to employment discrimination

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# What does the EEOC do?

- Investigate claims of discrimination and retaliation
- Develop regulations & policy to promote equal opportunity in the workplace
- Harass well-intentioned employers 😊

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# Work Sharing Agreements

- “Fair Employment Practices Agencies” (FEPAs)
- EEOC and the FEPAs work together to avoid duplication of effort
- Examples include the Florida Commission on Human Relations (FCHR) and various County & City Agencies

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# EEOC Enforcement

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Rehabilitation Act of 1973
- Americans with Disabilities Act of 1990
- Equal Pay Act of 1963 (EPA)
- Genetic Information Nondiscrimination Act of 2008

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# Charge Filing Trends

- Charge filing history:
  - 2007: 82,792
  - 2008: 95,402
  - 2009: 93,277
  - 2010: 99,922
  - 2011: 99,947
  - 2012: 99,412
  - 2013: 93,727
  - 2014: 88,778

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# THE CHARGE

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# Process

- Statute of Limitations: 300 days for federal claims; 365 for Florida claims
- The Charge Affidavit: EEOC assists in the drafting
- No presumption of guilt
- Charge should provide information explaining allegations, unlawful employment practice, individuals involved & laws violated
- The Affidavit should be executed by the Charging Party

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# Process

- EEOC will notify the Employer of the Charge by sending a copy of the Charge or notice of the Charge
- Title VII & ADA require notification within 10 days; this is difficult due to number of charges

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# Tackling The Charge

- Letter of Representation to EEOC
- Litigation Hold Letter
- Affidavits/witness statements
- Separate hostile parties

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# Tackling The Charge

- Request Investigator to provide a reading of Charge Affidavit
- Keep a detailed record of all conversations with EEOC
- Avoid retaliation

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# EEOC Charge Prioritization

- “C” Charges are immediately dismissed:
  - Untimely
  - Complaining about a statute not covered by the EEOC
  - Charges obviously without merit

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# EEOC Charge Prioritization

- “B” Charges are average
  - Charges which initially appear to have some merit, but will require further investigation
  - Employers typically offered mediation

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# EEOC Charge Prioritization

- “A” Charges are bad news
  - High priority charges (e.g. systematic discrimination, pattern & practice, priority issues, serious allegations, etc.)
  - Mediation is not offered
  - Potential is high for EEOC lawsuit

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# THE INVESTIGATION



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# Preparing For The Investigation

- Identify witnesses
- Identify documents
- Prepare strategy
- Prepare outline of questions
- Cross your fingers 😊

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# Witness Interviews

- Take funnel approach to questioning
- No threats or promises (especially confidentiality)
- Remain neutral- be independent from decision maker

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# Witness Interviews

- Opportunity to tell his/her side
- Advise management of any other information to be considered
- Has witness kept diary/calendar of events?
- Cover specific events chronologically - who, what, where, when, how, why & any witnesses?

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# Analyzing the Interview

- Are the facts that have been presented first-hand/personal knowledge?
- Do inconsistencies exist?
- Does the story make sense?
- Is there any documentation to corroborate?

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# Analyzing the Interview

- Observe witness demeanor
- Was witness forthcoming or did you have to pull the answers out?
- Any admissions?
- Any circumstantial evidence?

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# MEDIATION

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# The Mediation Option

- Advantages of mediation:
  - Process is free & confidential
  - Delay filing position statement
  - Potential to resolve the case
  - Repair existing relationship
  - Free discovery
  - Spend a fun-filled day with the Charging Party 😊

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# The Mediation Option

- Disadvantages:
  - Time
  - Cost
  - EEOC Mediators- some are effective, others are not very effective
  - Spend a fun-filled day with the Charging Party ☺

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# Approaching Mediation

- Who should attend?
- What should you bring with you?
  - Someone with authority to settle
  - Insurance carrier representative
  - Fact witness
  - Release
  - Rabbit's foot or four-leaf clover 

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# Effective Mediation Presentations

- Opening statements
- Don't attack
- Settlement strategies

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# Position Statements

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# Position Statements

- Employer history & description
- Relevant policies
- Tell a convincing & easy to understand story; be concise
- Respond to allegations & use comparators
- Legal argument (case law & EEOC guidance)
- Exhibits
- Affidavits, declarations & witness statements

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# Effective Position Statements

- Be careful in responding
- Don't assume you have to provide everything
- Permissible to object & ask for relevancy
- Wiggle room footnote
- Misstatements in SOP can be used at trial

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# The EEOC On-Site Investigation

- Generally indicates greater interest on part of EEOC
- May ask questions about things not in the Charge
- Examination of workplace
- Cooperate with investigator, but attempt to limit the scope to allegations in the charge
- Prepare a comfortable interview environment

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# The Decision



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# EEOC Determination

- Average time to finalize EEOC investigation: 180+ days
- Failure to state a claim
- Not timely filed
- Unable to conclude information established violation of statute

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# Charging Party Prevails

- Cause determination
- Request for reconsideration and substantial weight review
- Talk to the EEOC lawyers

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# Conciliation

- Like mediation
- Monetary relief
- Non-monetary relief
  - Reinstatement
  - Posting Notices
  - Training
  - Consent Decree
  - Confidentiality

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# Don't Get Bullied By The EEOC

- Good faith conciliation
- Memorialize everything in writing

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# No Resolution?

- EEOC Litigation: 200-450 cases filed every year
- Right to sue

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# Potential Pitfalls

- Communicating with the EEOC
- Not expecting the EEOC to litigate
- Retaliation
- Turning everything over
- Not participating in mediation or using other avenues to settle
- Misstating the facts or hiding evidence

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# Questions?



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# FLSA Overview

- What is the FLSA?

Federal law that generally requires employers to pay non-exempt employees: (i) at least the minimum hourly wage for all hours worked; and (ii) overtime pay at rate of 1.5x the regular rate for all hours worked above 40 in a given workweek.

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# FLSA Major Provisions

- Coverage
- Minimum Wage
- Overtime Pay
- Youth Employment
- Recordkeeping

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# Employment Relationship

In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”

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# Coverage

- Almost every employee in the United States is covered by the FLSA
- Independent contractors – not covered

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# Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The Federal minimum wage is \$7.25 per hour
- The Florida minimum wage is \$8.05 per hour

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# Minimum Wage: Issues

- Compensation Included
- Deductions
- Hours Worked

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# Compensation Included

- Wages (salary, hourly, piece rate)
- Longevity Pay
- Assignment Pay
- Certain bonuses (guaranteed, not discretionary)

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# Deductions

Deductions from pay illegal if

- Deduction is for item considered primarily for the benefit or convenience of the employer; and
- The deduction reduces employee's earnings below required minimum wage

Examples of illegal deductions

- Tools used for work
- Damages to employer's property
- Cash register shortages

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# Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time
- Sleep Time

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# Suffered or Permitted

- Work not requested but suffered or permitted is work time
- Use of cell phone while off duty

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# Waiting Time

Counted as hours worked when

- Employee is unable to use the time effectively for his or her own purposes; and
- Time is controlled by the employer

Not counted as hours worked when

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively for his or her own purposes

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# On-Call Time

On-call time is hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

On-call time is not hours worked when

- Employee is required to carry a pager
- Employee is required to leave word at home or with the employer where he or she can be reached

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# Meal and Rest Periods

Meal periods are not hours worked when the employee is completely relieved of duties for the purpose of eating a meal (typically at least 30 minutes)

Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid

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# Break Times for Nursing

- Employers required to provide “reasonable break time for an employee to express breast milk for nursing child for 1 year after birth.”
- Required to provide a place other than a bathroom shielded from view and free from intrusion.
- Only applies to non-exempt employees.
- Not required to compensate employees for time unless time would otherwise be used for compensable break.

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# Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless:

- Attendance is outside regular working hours;
- Attendance is voluntary;
- The course, lecture, or meeting is not job related; AND
- The employee does not perform any productive work during attendance

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# Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time
- Special rules apply to travel away from the employee's home community

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# Overtime Pay

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek

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# Overtime Issues

- Each workweek stands alone
- Regular rate
  - Payments excluded from rate
  - Payments other than hourly rates
- Deductions

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# Workweek

- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)

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# Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage

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# Regular Rate Exclusions

- Sums paid as gifts
- Payments for time not worked
- Reimbursement for expenses
- Discretionary bonuses
- Profit sharing plans
- Retirement and insurance plans

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# Regular Rate (RR)

Step 1: Total Straight Time Earnings (Minus  
Statutory Exclusions) Divided By  
Total Hours Worked = **Regular Rate**

Step 2: **Regular Rate** x .5 = Half Time Premium

Step 3: Half Time Premium x Overtime Hours  
= Total Overtime Premium Due

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# Example: Hourly Rate + Production Bonus

Total Hours = 48

Hourly Rate = \$9.00

Bonus = \$10.00

48 hours x \$9.00 =	\$432.00
Bonus	<u>+ 10.00</u>
	\$442.00

\$442.00/48 hrs =	\$9.21 (Regular Rate)
\$9.21 x .5 =	\$4.61
\$4.61 x 8 hrs =	\$36.88 (Overtime Due)

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# Compensatory Time

- Time off in lieu of overtime pay
- Applies to state and local government employers
- Time off must be at rate of not less than one and one-half hours of time for each hour of OT worked
- Must be provided for under CBA, employment agreement or written policy
- Caps
  - 240 – civilian employees
  - 480 – public safety
- Use – within a “reasonable period”

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# Exemptions and Exceptions

There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA

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# “White Collar” Exemptions

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# “White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “541” or “white collar” exemption -- applies to certain

- Executive Employees
- Administrative Employees
- Professional Employees
- Computer Employees

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# Three Tests for Exemption

Salary Level

Salary Basis

Job Duties

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# Minimum Salary Level: \$455

- For most employees, the minimum salary level required for exemption is \$455 per week
- Must be paid “free and clear”
- The \$455\* per week may be paid in equivalent amounts for periods longer than one week
  - **Biweekly:** \$910.00
  - **Semimonthly:** \$985.83
  - **Monthly:** \$1,971.66

\* Per memo put out by President Obama in July, the weekly amount for the salary basis test will go up to \$970 per week (\$50,440 annually) in July 2016.

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# Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work
- Need not be paid for any workweek when no work is performed

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# Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

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# Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay

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# Permitted Salary Deductions (continued)

Seven exceptions from the “no pay-docking” rule (cont.)

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act

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# Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption
  - During the time period in which improper deductions were made
  - For employees in the same job classifications
  - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

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# Safe Harbor

- The exemption will not be lost if the employer:
  - Has a **clearly communicated** policy prohibiting improper deductions and including a complaint mechanism
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future
- **Unless** the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints

# Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

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# Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the **management or general business** operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

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# Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet, and Database Administration

# Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

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# Field of Science or Learning

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences

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## Other Commonly Exempt Professions

- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Certified athletic trainers
- Licensed funeral directors or embalmers

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# Additional Nonexempt Professions

- Licensed practical nurses
- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians

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# Police / Fire

- “7(k) exemption”
- Public Entities only
- Maximum work period (28 days)
- Overtime threshold (police – 171 hours; fire --- 212 hours)
- Must be negotiated with unions
- Must be “declared”
- Work periods need not coincide with pay periods

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# Youth Employment

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# Youth Employment

- Federal youth employment rules set both hours and occupational standards for youth

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# Youth Employment

- 16 and 17 year olds may be employed for unlimited hours in any occupation other than those declared hazardous by the Secretary of Labor
- 14 and 15 year olds may be employed outside school hours in a variety of non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions
- Children under 14 years of age may not be employed on non-agricultural occupations covered by the FLSA

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# Recordkeeping

An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems

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# Recordkeeping

The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records

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# Recordkeeping

- Records need not be kept in any particular form
- Time clocks are not required

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# Recordkeeping

Every covered employer must keep certain records for each non-exempt worker

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# Required Posting

Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place

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# Common Errors to Avoid

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# Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record

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# Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employer when calculating overtime due

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# Common Errors to Avoid

- Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
- Treating an employee as an independent contractor
- Confusing Federal law and State law

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# The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits

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# Enforcement

- FLSA enforcement is carried out by DOL Wage and Hour Division
- Where violations are found, DOL advises employers of steps needed to correct violations, secures agreement to comply and supervises payment of back wages as applicable
- A 2-year statute of limitations generally applies to the recovery of back pay. In the case of a willful violation, a 3-year statute of limitations may apply

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# Enforcement

In the event there is not a voluntary agreement to comply and/or pay back wages, the Wage and Hour Division may:

- Bring suit to obtain an injunction to restrain the employer from violating the FLSA, including the withholding of proper minimum wage and overtime
- Bring suit for back wages and an equal amount as liquidated damages

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# Employee Private Rights

An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs

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# Penalties

- Employers who willfully violate the Act may be prosecuted criminally and fined up to \$11,000
- Employers who violate the youth employment provisions are subject to a civil money penalty of up to \$11,000 for each employee who was the subject of a violation
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation

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# QUESTIONS?

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