Clear Up Overtime Confusion

Knowing the fine points of wage and hour law can help determine when to pay overtime.

By Paul Falcone

Managing overtime properly can be daunting for managers who may not be aware of some of the intricacies and traps that await them within this specific area of wage and hour administration. If you’ve ever been frustrated by not knowing if you have to pay an overtime premium to employees who work unauthorized overtime, read on. There are twists and turns in this particular area of employment law, and you can’t be armed well enough in terms of protecting your company from wage and hour liability.

Your first question will have to do with whether employees are classified exempt or nonexempt. These terms confuse many managers, but a peek into the history that created these terminologies will help you understand.

A Brief History

In 1938, Congress passed the Fair Labor Standards Act (FLSA) to protect workers. It set overtime pay requirements and instituted child-labor protection laws. At the time, the country was pulling out of the Great Depression, and this major New Deal legislation attempted to get America working again by fairly controversial means.

In essence, if employers wouldn’t hire more people voluntarily and preferred instead to stretch out their existing employees by forcing them to work longer hours, then the government would step in and penalize those companies by applying a 150 percent premium on employees’ wages for what the government deemed to be excessive hours. Specifically, if an ordinary employee was forced to work more than 40 hours in a week, then the company would have to pay an overtime premium of one-and-one-half times the individual’s normal rate of pay for hours worked in excess of 40.

Company owners railed against the government for punishing them for simply “trying to stay in business,”

but the government relentlessly implemented the controversial legislation nevertheless.

If you were the owner or a senior manager of a company, you would be exempt from the protections of the new law—which is where the term “exempt” comes from. However, if you were an ordinary worker, you would be covered or protected by the act, or nonexempt.

**Classification: Your Call**

Bearing in mind that it’s your company’s responsibility to pay overtime to nonexempt workers for hours worked in excess of 40 in a week—or in some states, such as California, in excess of eight in a day—it’s up to you to classify employees properly.

Most companies don’t have problems identifying their chief executive officer and vice presidents as exempt from the protections of the FLSA. After all, these people profit directly from the financial success of the company. That’s why they’re paid for their overall performance on the job and not technically for their time.

Employers also pretty much understand that clerks, receptionists and laborers are indeed nonexempt. They’re paid for their time, protected by the FLSA and docked when they come in late but paid overtime for hours worked in excess of 40 in a week.

The situation gets fuzzy with “wobbler” job categories such as coordinators, analysts and administrators. Some classify these paraprofessional and junior manager positions as exempt, while others place them in the nonexempt, overtime-eligible category.

“The decision is up to you and your company, but just understand that if you’re ever audited, the government will expect you to pay overtime whenever there is any doubt as to an employee’s classification,” says Ann Kotlarski, senior litigation partner in the Los Angeles office of Seyfarth Shaw. “If you choose not to pay overtime and classify these wobblers ‘upward’ into the exempt category, then the burden will be on you and your company to prove or otherwise demonstrate that they’re indeed exempt from overtime pay.”

**Paying Overtime**

Understand that overtime premiums must be paid for all overtime worked, including unapproved overtime. “In short,” according to Kotlarski, “you’re allowed to discipline an employee for working unapproved overtime, but you’re not allowed to withhold the overtime pay. That would be a classic wage and hour violation.”

If you need to discipline someone, your written warning might read:

“Although we appreciate that you made yourself available to work overtime, please understand that working unapproved overtime may have significant budget implications and consequently violates company policy. Despite our prior discussions instructing you not to work overtime without your super-

visor’s prior approval, you have again worked unauthorized overtime, which will be paid to you at the time-and-one-half premium rate. However, please understand that failure to obtain appropriate advance approval in the future may result in further disciplinary action up to and including dismissal.”

How often would you expect to discipline someone for working overtime hours on a practical basis? Probably not too often because employers typically appreciate that kind of flexibility and commitment in their workers. However, repeated violations that impact your department’s budget may force you to move in that direction.

More significant, you may occasionally sense that a troubled employee is being baited or coached by a plaintiff’s attorney to repeatedly engage in these types of violations. Whenever that’s the case, respond in writing to formally document your adherence to the law.

You have the reciprocal right to instruct employees to work overtime as the workload demands. That’s a basic right of any supervisor, and employees who fail to make themselves available could likewise be held in violation of workplace conduct standards.

Of course, before disciplining someone formally for insubordination, be sure to look at more practical issues like the reasonableness of your request, the amount of notice you gave the employee, and how you would treat any and all employees under the same circumstances. This will avoid perceptions of favoritism, bias and, potentially, discrimination in the workplace.

**You can discipline an employee for working unapproved overtime, but you can’t withhold the overtime pay.**

What’s the biggest threat that wage and hour violations pose? “Wage and hour violations lend themselves to class-action lawsuits,” according to Kotlarski. “Plaintiffs’ attorneys often question prospective nonexempt clients who come in looking for representation to pursue harassment and discrimination claims to see whether they worked unpaid overtime hours or skipped lunches and breaks without pay.”

If the answer is, “Oh, sure, we all did that every day; it was expected of us,” you could very well see a class-action wage and hour claim attached to an exempt employee’s other legal charges.

“And they could be expensive,” Kotlarski continues. “Calculations typically go back several years, and it’s not uncommon for damages resulting from unpaid overtime plus attorneys’ fees to settle in the seven-figure range, depending on the size of your company and the number of misclassified workers.”

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The lesson here? Don’t panic if one of your nonexempt employees misses a break or lunch period on occasion. However, don’t become known as a company where skipped meals and breaks become the norm or where working unpaid overtime occurs on an “expected” basis. If you steer clear of developing that type of reputation by respecting the law and treating your nonexempt workers fairly, then occasional, nonsystemic lapses probably won’t pose much of a serious legal threat.

Other Triggers
Managers always have questions about specific situations that may trigger overtime. Following are a few of those scenarios:

- **Training time.** Does training after work hours trigger overtime payment obligations? “Yes,” according to Koltar- 
  ski, “if it’s mandatory.”

  If you tell employees that they must attend mandatory training on Monday night from 6 to 9 p.m., then it will trigger either daily overtime or weekly overtime, provided it pushes the overall hours worked that week above the 40-hour limit.

  Remember that voluntary training after hours to gain additional skills or knowledge is not work time, even if job related. So you don’t have to pay overtime to an employee who chooses to take a Monday night class at a university extension program.

  Finally, keep in mind that training during work hours may be considered work time if it is:
  - Approved by a manager.
  - Directly related to the employee’s job.
  - Designed to enhance the employee’s performance.

  Therefore, if attendance at your lunch-and-learn or brown-bag workshops from noon to 1 p.m. is indeed mandatory, then an additional hour of overtime pay may result, since the hour-long break for lunch may be deemed technically forfeited. Check with qualified legal counsel to determine how to handle this situation appropriately in your state.

- **Travel time.** Ordinary travel time to and from work is not considered work time, regardless of distance or time required to get to the office. However, intercompany travel from one work location to another is considered work time.

  What about long-distance travel for nonexempt employees? If a nonexempt administrative assistant, for example, accompanies his or her boss on an overnight trip out of town, then the overtime calculations can become quite complicated. For example, if they fly together from Boston to Chicago during normal business hours (even if those hours are on a day the assistant normally would not work), then those travel hours would count as compensable work time.

  If the boss and the nonexempt administrative assistant arrive at the hotel at 5 p.m., unpack, freshen up and eat from 6 to 8 p.m., those three hours would typically not be considered work time. After all, even though they’re on the road, they would simply be eating and freshening up after normal business hours.

  Finally, if they then attend a business meeting that night from 8 to 10 p.m., those two additional work hours would count toward any daily overtime in states that require daily overtime or count toward the 40-hour workweek.

- **Waiting time.** “In general, you’re not responsible for counting waiting time toward compensable work time if the employee is free to do other things during that time period, and does not have to be in a designated area at a specific time ready to work. In comparison, if you require your employees to wait by the phone—for example, to monitor security alarms or await customer service calls from home—then they are technically being ‘paid to wait,’ and that is indeed considered compensable time,” says Koltar- ski.

Getting Backup
Clearly, managing overtime can get tricky, and you will always want to speak with your human resource, finance or legal departments or outside counsel to ensure that you’re consistently applying appropriate workplace rules and procedures.

Being sensitive to these workplace situations, however, will go a long way in helping you. If you handle these situations correctly, you will be able to allocate the workload in your group efficiently, adjust for unexpected changes in schedule, and insulate your company from the twists and turns of wage and hour liability.