

Wage and Hour Violations Can Sneak Up on You

Even if you have been scrupulous about properly classifying all positions in your organization, changing circumstances require vigilance to ensure continued compliance.

1. **Have staff reductions affected FLSA status?** Be careful when managers start picking up the work of laid-off employees. Positions formerly classified as “exempt” may need to be reclassified if managers are now performing nonexempt tasks more than 50% of the time.
2. **Has your independent contractor become your employee?** An independent contractor whose assignment has crowded out other clients may actually be your employee and subject to all applicable state and federal wage and hour laws, tax withholding, and company benefits.
3. **Are you assuming the Computer exemption is all encompassing?** Computer professionals who meet the exemption tests and who earn a minimum hourly rate of \$37.94 (\$6,587.50 monthly, \$79,050.00 annually) may be paid on a salaried basis and are exempt from overtime. But this exemption does not extend to meal and rest break requirements.
4. **Do you leave it up to employees to take their required meal and rest breaks?** Employees in nonexempt positions and exempt Computer professionals must take required meal and rest breaks. Meal breaks may be waived only under very limited circumstances that must be documented. The penalty for missing a meal or rest break – one additional hour of pay at the employee’s regular rate, paid on the next paycheck – applies each time the meal or rest break is missed. You must “authorize and permit” employees to take rest breaks, but you must *ensure* that employees take meal breaks relieved of all duty, not performing any work, and free to leave the workplace.
5. **Are your “indispensable” positions likely to be exempt?** Not necessarily. Positions, not people, are classified as exempt or nonexempt. Crucial employees may be in nonexempt positions.
6. **Do you assume that being paid a salary indicates exempt status and being paid hourly indicates nonexempt status?** This is a treacherous assumption. Your method of paying an employee does not create exempt or nonexempt status. It is true that exempt positions are usually paid on salary, but nothing stops you from also paying salaries to employees in nonexempt positions as long as daily time records are kept, overtime is paid, and meal and rest breaks are observed.

How can you avoid these pitfalls?

- **Properly classify positions as exempt or nonexempt.** Revisit position classifications periodically and after major staffing or organizational changes.
- **Verify independent contractor status** prior to entering into a contract. If you are unsure about this, there are third party companies that will handle the verification process. Put limitations on the length of contract assignments to avoid “easing into” an employment relationship.
- **Have clear, written policies regarding meal and rest breaks and daily time tracking.** Make sure managers, supervisors and employees are thoroughly trained regarding tracking time worked and time off.
- **Don’t make assumptions.** Being salaried (indispensable, highly educated, etc.) does not equal exempt. If in doubt after evaluating a position, err on the side of classifying it as nonexempt. Work – not the person doing it - is classified as exempt or nonexempt.

Enforcement is increasing. On November 19, 2009 Secretary of Labor Hilda Solis announced that the Department of Labor had increased its investigative staff by approximately one-third, hiring 250 new wage and hour investigators. According to Jenna Greene (The Blog of LegalTimes, November 20, 2009), in the three months prior to Solis’ announcement the DOL brought two enforcement cases that resulted in recovering nearly \$2 million in back wages for 500 workers. Last December, the Northern District Court of California preliminarily approved a \$12.8 million class action settlement against UPS Supply Chain Solutions for about 660 individuals misclassified as independent contractors.

The stakes are high if a wage and hour violation sneaks up on you.

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For information on the FLSA exemption criteria, go to <http://www.dol.gov/elaws/esa/flsa/screen75.asp>

Note: Maureen Clark owns Clark Associates, a Human Resource Management consulting firm specializing in HR infrastructure – setting up and cleaning up HR functions, particularly in small to mid-size organizations. Her clients include .com, .net, .org and .edu employers. She has special expertise in developing Employee Handbooks, resolving difficult employment issues, and serving as an expert witness in HR-related cases. She can be reached at mclark@clarkassoc.com