

"Employers: Understand the 10 Overtime Traps"

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Identifying the biggest traps for Florida builders in computing wages and paying workers is a tough task. The federal Fair Labor Standards Act ("FLSA")--the law that requires the payment of minimum wage (now \$6.79/hour in Florida) and overtime to many workers--is so complicated and fact-specific that there are dozens of ways in which smart, careful and honest builders can get trapped by workers, their hungry lawyers and the Government. Nonetheless, with apologies to the Country Music Hall of Fame, here a few general descriptions of employees' "Greatest Hits":

1. "You Ain't Got No Class--No How": there are two general FLSA classifications of workers—"non-exempt" and "exempt." Everyone is presumed to be an hourly employee (aka "non-exempt") entitled to the minimum wage and to overtime. However, certain executive, administrative and professional employees are "exempt" and need not be paid OT if they perform certain duties and are paid a salary of at least \$455/week without deductions for the quantity or quality of their work. Builders sometimes misclassify hourly employees as "exempt" in the mistaken belief that (a) simply paying a salary rather than an hourly wage eliminates the OT obligation or (b) an "executive" can supervise fewer than two actual employees of the company or (c) a title (not job duties) makes someone "exempt" or (d) an "administrative" worker's primary tasks can be production/building work rather than back-office support (accountant, HR, etc.).
2. "If Fingerprints Showed Up on Skin, Wonder Whose I'd Find On You?": Speaking of evidence: the FLSA requires employers to keep records of hours worked by and wages paid to employees. If you're not sure you're doing it right, find out: don't give the employees or the Department of Labor an easy-to-prove technical violation of the law.
3. "Your Cheatin' Heart": Non-exempt workers must be paid for all hours worked, whether or not the work is done during scheduled hours or whether it actually is recorded on time cards. "Off the clock" work (aka "free work") is a common claim that often is hard for builders to win: the FLSA gives employees the benefit of the doubt in disputes about hours worked and it usually is very hard for builders to prove the worker did not work the hours claimed (especially since FLSA lawsuits sometimes can be filed three years after the hours claimed). Workers often can recover double damages and attorneys fees if they win. The message in this tune: don't cheat.
4. "Devil to Pay": Non-exempt employees must be paid overtime for working more than 40 hours/week. Builders cannot allow hourly workers to "bank" overtime hours and use them as "comp time" time-off in subsequent weeks. (Although overtime pay generally is computed as 1.5 times the normal hourly wage, there are a few exceptions--beyond the scope of this article--in which employers can pay less.)

5. **"Please Release Me—Never Let Me Go":** Hourly employees cannot waive/release in advance their rights to FLSA minimum wages or OT; for example, a builder cannot have framers sign an agreement that they will give up their right to OT. (The FLSA does allow employees to release claims against employers for hours they claim to have worked in the course of settling DOL investigations or lawsuits.)

6. **"Stand By Your Man":** Hourly employees must be paid for time they are on after-hours "stand by" (aka "on call") even though not actually working IF the on-call restrictions are so severe that they cannot engage in personal activities (e.g., play ball with the kids). (Of course, the workers must be paid for hours worked if actually called out.) Thus, if an hourly worker must "take call," don't make the required response time so short that he must stay by his phone.

7. **"I'm Just An Average Joe":** Overtime must be computed on a work-week basis. Builders cannot average hours over several weeks. If an employee works 50 hours one week and 30 hours the next, he must be paid 10 hours OT for the first week, i.e., the company cannot claim that the two-week "average" is 40 hours and thus OT is not owed.

8. **"Independence Day":** Independent contractors ("subs") are not FLSA "employees" and need not be paid minimum wage/OT. However, merely labeling someone a "contractor" does not make it so. The FLSA uses an "economic realities" test to determine "contractor" status, examining such factors as the company's control of worker activities, duration of the relationship, who supplies necessary tools, etc. This is a dangerous determination: if you wrongly treat a worker as a "contractor," you may owe him unpaid OT for several years (and also be in trouble with the IRS for not withholding/deducting as required for employees). Be careful about calling someone "independent."

9. **"High Cost of Low Livin'!":** Builders can have a "no OT work unless pre-approved" policy but, even if employees violate it, they must be paid for all OT worked (because the FLSA requires the employer to prevent the work if it is not wanted). The solution: pay but discipline (even discharge, if appropriate) for such policy violations.

10. **"How Can I Miss You If You Won't Go Away?":** Employees must be given their final paychecks for hours worked by them even if they quit or are fired for poor performance. Be careful of withholding the final check even if you think he has stolen from you—the law does not favor "self help" and failure to pay might result in a "minimum wage" claim.

Bonus Hit: "Travellin' Man": Non-exempt employees must be paid for all time spent traveling from site-to-site (or off-site to get tools/parts/permits/people) once the work day begins. The day usually "begins" when he reports to the first site (but it may begin earlier if he has to stop on the way in to fetch a tool, etc.).

Second Bonus Hit: "Make Me Late For Work Today!": The FLSA also protects "exempt" supervisors/HR/accountants/engineers/etc. You can lose that exemption—and become liable for their OT—for making certain improper deductions from their salaries, including deductions if they are late to work. With few exceptions, "exempts" must be paid their full salaries (at least \$455/week) for each week in which they do any work.

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If you find yourself singing these songs, or the music sounds familiar, you might want to consult your favorite employment lawyer and think about changing your tune.

Information contained in this article is for general education and knowledge. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different, and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

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