

Time & Money: Avoiding Common Mistakes Under the FLSA and N. C. Wage and Hour Act

Susan M. Parrott

Kerry A. Shad

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Kerry A. Shad, kshad@smithlaw.com

Ms. Shad's practice focuses on representing employers in connection with all aspects of employment-related litigation and counseling. She has represented clients in state and federal courts throughout the country, including North Carolina, Arizona, California, Florida, Georgia, Illinois, New York, Pennsylvania, South Carolina, and Tennessee. Her experience includes defending individual, class and collective action claims of discrimination, harassment, wrongful discharge, retaliation, and wage and hour violations; representing clients in investigations by state and federal Department of Labor and The Equal Employment Opportunity Commission and similar agencies; serving as "in-house" employment litigation counsel to large company managing employment litigation across the country; and representing clients in disputes involving alleged violations of non-competition agreements.



Susan M. Parrott, sparrott@smithlaw.com

Ms. Parrott regularly assists clients in complying with state and federal employment-related laws and preventing employee lawsuits. Her experience includes identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and plant closings and developing and interpreting employment, non-competition, confidentiality, and severance agreements. Her appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Prior to attending law school, Ms. Parrott worked for the United States Environmental Protection Agency and obtained a Masters Degree from the University of North Carolina, School of Public Health.

Common Mistakes

- Misclassification of Non-Exempts as Exempts
- Misclassification of Employees as Independent Contractors
- Not paying for all time worked
- Failure to calculate wages or overtime correctly

Mistake #1 Misclassification of Non-Exempts as Exempts

- “All our employees are salaried; they are all exempt.”
- “We don’t have any hourly employees, so we don’t pay overtime.”

Mistake #1 Misclassification of Non-Exempts as Exempts

Avoiding this mistake:

- Know the exempt classifications and requirements for each
- Review your practices

“White Collar” Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity

“White Collar” Exemptions

- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA
- Highly Compensated Employee (\$100,000 and one or more exempt duties for one of the white collar exemptions)

Exempt Status Requires Both:

- Payment on a Salary Basis
 - \$455/week (\$910 biweekly; \$985.83 semi-monthly; \$1,971.66 monthly)
 - No improper deductions

and

- Satisfaction of the job duties required for the exemption

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; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

From U.S. Department of Labor website, www.dol.gov

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; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Learned Professional Duties

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

Common Problems

- Basing exempt status on job description alone
 - Actual duties govern
- Job titles are not determinative
 - “Scientist” or “lab technician”

Common Problems

- Administrative Exemption may be overused
- Executive assistants are not necessarily exempt

Altemus v. Federal Realty Investment Trust (4th Circuit, July 2012)

Common Problems

- Not all supervisors are exempt
 - Can she really be involved in hiring/firing?
 - Is the supervisor more like the “lead foreman”?
- Not all employees who work with computers are exempt
 - Help desk personnel are generally non-exempt

Common Problems

- Not all health professionals are exempt – a RN paid by the hour is non-exempt

Common Practices that Jeopardize Exempt Status

- Improper Deductions from salary
 - Deductions for not working certain number of hours (Dunkin Donuts – deduction for working less than 60 hours = non-exempt managers)
 - Partial day deduction

Common Practices that Jeopardize Exempt Status

- Comp Time and Hourly-Based Bonuses for Exempt Employees (permissible, but don't want to appear to pay by the hour)
 - Exempts can receive additional pay

Mistake #2 Misclassification of Employees as Independent Contractors

Employee or IC?

- case-by-case basis
- consider how much direction and control the company retains over
 - the desired work results
 - the means and methods to accomplish them

Why is it important to get it right?

- Taxes

- Employers must pay FICA, FUTA, Medicare, state taxes and make federal and state income tax withholdings
- Independent contractors, on the other hand, are responsible for payment of their own taxes

Why is it important to get it right?

- Benefits
 - ERISA governs benefits for employees. Independent contractors generally are not eligible for benefits

Why is it important to get it right?

- Employment law liability
 - Employees are protected under the FLSA. Independent contractors are not covered by the FLSA
 - Employees are protected by the federal and state discrimination statutes. Independent contractors generally are not covered by these laws

Why is it important to get it right?

- Vicarious liability
 - Employers are vicariously liable if their employee causes harm to a third party while in the course of the employment
 - Employers are generally not liable for harm caused by independent contractors

Is the Worker an Employee or an Independent Contractor?

- No one factor is dispositive
- IRS now refers to 3 primary factors:
 - Behavioral control
 - Financial control
 - Relationship of parties

IRS Primary Factors

- Behavioral Control
 - Right to direct and control what work is accomplished
 - Type of instructions given
 - Degree of instruction given
 - Amount of training that is provided
 - Whether an evaluation system is in place that measures the details of how the work is performed rather than just the end result

IRS Primary Factors

- Financial Control
 - The worker's investment in the equipment used
 - The worker's opportunity for profit or loss
 - Payment of business expenses and unreimbursed expenses are indicia of independent contractor status

IRS Primary Factors

- Financial Control
 - The worker makes his or her services available to the market
 - Independent contractors generally provide their services to more than one company

IRS Primary Factors

- Financial Control
 - The worker is paid a regular wage for hourly, weekly or some other period versus a flat fee for the job
 - Independent contractors generally are paid a flat fee for the work

IRS Primary Factors

- Type of Relationship
 - Written contracts describing the relationship
 - Employee benefits, e.g., insurance, pension, vacation, or sick pay
 - The indefiniteness of the relationship
 - Are services performed by the worker a key aspect of the business

FLSA Test

- Economic reality test
 - whether the worker is economically dependent on the business he or she is working for
 - workers who, as a matter of economic reality, are in business for themselves likely will be found to be independent contractors

FLSA Factors

- The degree of control exerted by the alleged employer over the worker (power to hire and fire, supervises and controls work schedule or conditions, determines rate/method of payment, maintains employment records)
- The worker's opportunity for profit or loss
- The worker's investment in the business

FLSA Factors

- The permanence of the working relationship
- The degree of skill required to perform the work
- The extent to which the work is an integral part of the alleged employer's business

Best Practices for Creating IC Relationship

- If no third party involved, execute a written contract with the worker with the following terms:
 - Complete list of tasks to be performed
 - Results of work to be obtained
 - Consistently refer to the worker as independent contractor
 - Limit work to a specific term or project that cannot automatically renew

Best Practices for Creating IC Relationship

- Do NOT require daily or weekly reports (milestones of dates/production is acceptable)
- Do NOT specify work hours or schedules
- Allow independent contractors to determine HOW work will be done
- Do NOT require exclusivity (requiring a confidentiality agreement is permissible, requiring a non-compete agreement can jeopardize independent contractor status)

Best Practices for Creating IC Relationship

- Expressly state that the worker is not eligible and will not receive or accept employee benefits
- Indemnity from the worker to the company for taxes and other liabilities in the event that the worker is found to be an employee and not an independent contractor

Best Practices for Creating IC Relationship

- If a staffing, leasing or temporary help agency is involved, written contract with the agency with the following terms:
 - Workers are employees of the agency and not the company
 - Agency is an independent contractor and solely responsible for paying wages, withholding taxes, providing workers' compensation and all other benefits

Best Practices for Creating IC Relationship

- Agency will indemnify the company for any failure to properly pay wages including overtime, or failure to properly pay or withhold taxes
- Agency will indemnify the company for any claim brought against the company as an alleged employer or joint employer of the worker

Best Practices for Maintaining IC Relationship

- Do NOT treat employees and independent contractors the same
- Do NOT retain former employees as independent contractors
- Do NOT allow independent contractors to perform core business functions

Best Practices for Maintaining IC Relationship

- Do NOT require independent contractors to undergo extensive training to perform the work tasks (consideration should be given to providing separate sessions for any required site training such as harassment policy)
- Do NOT discipline independent contractors or conduct performance evaluations on them

Best Practices for Maintaining IC Relationship

- Do NOT grant awards or bonuses to independent contractors
- Do NOT provide independent contractors a copy of the company employee handbook, copies of policies that provide for statutory employee protections (for example, FMLA) or policies concerning attendance, performance, benefits

Best Practices for Maintaining IC Relationship

- Provide only policies that address on-site conduct (such as harassment, workplace violence, security) and customize those policies to specifically apply to independent contractors (not employees)

Best Practices for Maintaining IC Relationship

- Allow independent contractors to work for other companies
- Require independent contractors to use their own tools and equipment
- Separate independent contractors from company staff, if possible
- Limit independent contractor participation in company events

Mistake #3 Not Paying for All Time Worked

“We don’t pay for unauthorized overtime.”

“We don’t start paying until he clocks in even though he is here earlier.”

What is Compensable “Work Time”?

- What is “work time” under the FLSA?
 - Work week is all time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed work place (29 C.F.R. § 785.7)

What is Compensable “Work Time”?

- What is “work time” under the FLSA?
 - An employee must be paid for “all time spent in physical or mental exertion . . . pursued necessarily and primarily for the benefit of the employer or his business.”

*Tenn. Coal, Iron & R.R. Co. v. Muscoda
Local No. 123, 321 U.S. 590 (1944)*

Basic Rule

If employer “suffers or permits” an employee to provide services, that time is “work time” for which the employee should be compensated.

Unauthorized Overtime

Lack of prior authorization does NOT relieve employer of obligation to pay for the hours worked.

Rest and Meal Breaks

Rest Break

- Rest periods of short duration (5 to 20 minutes) must be counted as hours worked (29 C.F.R. § 785.18)
- Coffee breaks, smoke breaks, restroom breaks are “rest periods”

Rest and Meal Breaks

Meal Break

- If the employee is “completely relieved from duty” during a meal break, the break is not work time and is not compensable (29 C.F.R. § 785.19)
- Generally, a meal break is 30 minutes or longer

Rest and Meal Breaks

Meal Break

- It is not necessary that an employee be permitted to leave the premises if he is otherwise relieved from duty during the meal break

Rest and Meal Breaks

Meal Break

- Is the time for the “predominant benefit” of the employer or the employee?

Roy v. County of Lexington, 141 F.3d. 533 (4th Cir. 1998)

Rest and Meal Breaks

Meal Break

- An office employee is not “relieved from duty” if he is required to remain at his desk to answer the telephone during a meal break, even if no telephone calls are received during the break

Rest and Meal Breaks

Meal Break

- *Caution:* FLSA does not require meal breaks, but applicable state law may dictate timing and length of meals and may require that such breaks be paid

Rest and Meal Breaks

Does a North Carolina employer have to give rest and meal breaks?

How many hours can a North Carolina employer work an adult employee?

Rest and Meal Breaks

Meal Break

- Automatic deductions for meal breaks are permissible, but if the employer knows or should have known that the employee is continuing to work, then the time is “work time” for which the employee must be compensated

See Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013); *White v. Baptist Memorial Health Care Corporation*, No. 11-5717 (6th Cir. Nov. 6, 2012).

Rest and Meal Breaks

Best Practice Tips

- Require employees to take meal break away from work area to avoid working through break claims
- Train supervisors to monitor compliance
- If use automatic deductions, consider having a policy that requires employees to report when they work through the break

Travel Time

Time spent “traveling” after the workday has started is compensable

Travel Time

- Ordinary home to work travel is not normally work time (29 C.F.R. § 785.35)
 - If an employee is required to report to a location to receive instructions or pick up equipment, travel from that place to the job is work time and must be paid
- Travel between job sites during normal work day is work time (29 C.F.R. § 785.38)

Travel Time

Example: computer technician works on employer premises from 9 am – 5 pm, then drives to a client site to work until 8 pm, and finally returns to the employer premises at 9 pm. All time is compensable. (If he went home at 8 pm rather than back to employer premises, time spent commuting home after 8 pm not compensable.)

Travel Time

- Travel for special one-day (no overnight stay) assignment in another city is work time (29 C.F.R. § 785.37)

Example: Employee lives in Raleigh and must fly to Philadelphia on a special one-day assignment. Work time begins when she arrives at the RDU airport and ends when she leaves the RDU airport to return home.

Travel Time

- Overnight travel away from home
 - Travel time is work time only when it cuts across the employee's workday (regular workday hours and same hours on non-work days) (29 C.F.R. § 785.39)

Travel Time

Example: Employee regularly works from 9 – 5, Monday – Friday, the travel time during those hours is work time even if on a Saturday or Sunday. Travel time before 9 am or after 5 pm is not work time on any day.

Travel Time

- Work performed while traveling is work time (29 C.F.R. § 785.41)

Example: Employee prepares for a meeting while flying to another city.

Travel Time

Transportation Choice Matters

- Travel time outside regular working hours as a passenger on a plane, bus, boat or train is not work time (29 C.F.R. § 785.40)
 - Employer can require such travel and avoid paying for travel time

Travel Time

- If employee chooses to drive instead of using public transportation, employer has option to consider as work time
 - Actual time spent driving, or
 - The time that would have been counted as hours worked had the employee used public transportation (if during business hours, count it; if not, don't)

Travel Time

- If employee must drive, all driving time is work time

Travel Time

Best Practices:

- Pay for all travel time during normal work hours
- Pay for travel time outside of normal work hours if employee has to drive
- Do not have to pay for travel time outside of normal work hours if public transportation is used and no work is done while traveling

Mistake #4 Failure to Calculate Wages or Overtime Correctly

“We changed our bonus plan, so we don’t plan to pay him the bonus he earned under the old plan.”

“I don’t have to include that bonus in his overtime pay, do I?”

“We don’t pay overtime because we give ‘comp’ time.”

N.C. Wage Payment Law

“Wage” “includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or practice of making such payments.”

N.C. Gen. Stat. §95-25.2(16)

N.C. Wage Payment Law

Common Problems

Vacation Pay

- Employer doesn't have to provide vacation pay
- If do, comply with Company policy or practice

N.C. Wage Payment Law

Common Problems

Vacation Pay

- Notify employees of any policy or practice that results in a loss or forfeiture of vacation pay
- Review vacation policies for accrual, carryover, pay in lieu of, and entitlement or forfeiture at termination

N.C. Gen. Stat. §95-25.12

N.C. Wage Payment Law

Common Problems

Bonuses

- Policies or practices relating to bonuses or commissions should address:
 - how and when bonuses or commissions are earned
 - under what conditions and in what amounts bonuses or commissions will be paid at termination of employment

13 N.C.A.C.12.0307

N.C. Wage Payment Law

Common Problems

Bonuses

- If the employer changes a bonus or commission plan that establishes specific earning criteria, the employee is entitled to the amounts earned under the prior plan through the date of the change and under the new plan going forward if earning criteria are met under each plan

13 N.C.A.C. 12.0307

Compensatory Time

- Permitted for public employers
- Exempt private sector employees may be given compensatory time
- Non-exempt private sector employees may not be given compensatory time in lieu of overtime

Calculation of Overtime

Non-Exempt employees must receive 1 ½ times the “regular rate” for all hours over 40

What is the “regular rate?”

- “all remuneration for employment paid to, or on behalf of, the employee”
- Total earnings in a workweek divided by total hours worked in the workweek
- Must be at least minimum wage

Calculation of Overtime

- Included in the regular rate are payments such as:
 - attendance and productivity bonuses
 - non-discretionary bonuses
 - shift differentials
 - extra pay for being on-call

Calculation of Overtime

- Excluded from the regular rate are payments such as:
 - pay for time not worked
 - pay for expenses incurred on employer's behalf
 - discretionary bonuses
 - paid leave (not hours worked)
 - bonuses based on percentage of total earnings (already includes overtime)
 - profit sharing/retirement and insurance plans

Conclusion

- Most employers are trying to be compliant with the wage and hour laws
- Not always intuitive
- Laws are evolving
- Inadvertent, but costly, mistakes are common, even for very sophisticated employers

Thank you

Kerry A. Shad

Partner

919.821.6672

kshad@smithlaw.com

Susan M. Parrott

Partner

919.821.6664

sparrott@smithlaw.com

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