



Morgan Lewis

C O U N S E L O R S   A T   L A W



**LABOR AND EMPLOYMENT LAW SEMINAR**

**Top Twenty Ways to Get In Wage and  
Hour Trouble**

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# Issues with Nonexempt Employees

## 1. Failing to record and pay for all compensable hours of work between the first and last principal activities of the day.

- **For example:**
  - logging into computer programs
  - preparing a work area before the shift
  - changing into work clothes
  - putting on protective equipment



## Issues with Nonexempt Employees (cont.)

2. **Using improper rounding policies and systems at the beginning and end of work shifts and meal periods.**



## Issues with Nonexempt Employees (cont.)

- 3. Failing to record and pay for work the employer knew or had reason to know was performed before or after the scheduled workday, or at home or at other remote locations.**

## Issues with Nonexempt Employees (cont.)

4. **Failing to record and pay for all meal periods of less than 30 uninterrupted minutes.**

## Issues with Nonexempt Employees (cont.)

### 5. Failing to include all remuneration (except the statutory exclusions) in the regular rate of pay before calculating the overtime rate of pay.

- **For example:**
  - shift differentials
  - cash payouts from cafeteria benefit plans
  - call back pay
  - nondiscretionary bonuses

## Issues with Nonexempt Employees (cont.)

6. **Compensating nonexempt employees for overtime in paid time off rather than in premium wages.**

## Issues with Nonexempt Employees (cont.)

7. **Employing the fluctuating workweek method of paying for overtime without meeting the following conditions that (a) the hours must fluctuate, (b) there must be a clear and mutual understanding before the work is performed of how overtime will be calculated and (c) the salary may not be reduced in any workweek for any reason.**

## Issues with Nonexempt Employees (cont.)

8. In the restaurant and hotel businesses, failing to properly inform nonexempt tipped employees that the employer uses the tip credit when computing regular and overtime rates of pay.

## Issues with Nonexempt Employees (cont.)

### 9. Failing to take full advantage of industry-specific exemptions in DOL regulations.

- The newly revised white-collar exemptions and guidance from the DOL illustrate certain industry-specific exemptions that should not be overlooked.
- For example:
  - insurance claims adjusters
  - employees in the financial services industry
  - registered nurses (RNs) vs. licensed practical nurses (LPNs)

# Issues Concerning Exempt Employees

## 10. Misclassifying nonexempt employees as exempt under federal and/or state duties tests.

- **For example:**
  - inside salespeople
  - paralegals
  - help desk operators and desk-side support technicians
  - accountants vs. bookkeepers and accounting clerks
  - production workers



## Issues Concerning Exempt Employees (cont.)

**11. Treating trainees as exempt before they fully qualify under the applicable exempt duties tests.**



## Issues Concerning Exempt Employees (cont.)

**12. Failing to guarantee the proper salary amount to exempt employees.**

## Issues Concerning Exempt Employees (cont.)

**13. Prorating the salary of a part-time exempt employee to less than \$455/week.**

## Issues Concerning Exempt Employees (cont.)

### 14. Making improper deductions from the salaries of exempt employees.

- **For example:**
  - docking pay
  - recouping the cost of lost or damaged equipment
  - Recouping the cost of employee errors

## Issues Concerning Exempt Employees (cont.)

**15. Failing to promulgate and communicate a complaint mechanism employees may use to report improper deductions from salary so that prompt corrections can be made.**

# Issues Concerning all employees

## 16. Failing to meet recordkeeping requirements for both exempt and nonexempt employees.

- **For example:**
  - failing to keep a record of the official workweek(s) for employees
  - failing to record all hours of work and wages paid
  - failing to track meal and rest breaks

## Issues Concerning All Employees (cont.)

**17. failing to stay informed of FLSA requirements by subscribing to publications, attending training courses, and seeking periodic advice regarding changes in the law or the interpretation of the law.**

## Issues Concerning All Employees (cont.)



**18. Failing to conduct periodic, preventive compliance audits and periodic training of first-line managers and payroll staff, including in local offices/branches/facilities.**

- **For example:**
  - failing to document compliance efforts
  - failing to document compliance actions to substantiate the good-faith defense

## Issues Concerning all employees (cont.)

### 19. Failing to post required materials.

# Issues Concerning All Employees (cont.)



## 20. Failing to know and comply with state wage and hour law requirements (including salary levels) that differ from The FLSA.

- **For example:**
  - higher state/local “living wage” standards for nonexempt employees
  - state daily overtime requirements
  - absence of state computer employee or highly compensated employee exemptions
  - higher salary level test

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