



10 Tips for Avoiding Wage and Hour Violations

1. When in doubt, put workers on payroll as employees. An individual who performs services for a person may be either an independent contractor or an employee. If the individual is an employee, the law imposes obligations on the employer, such as payroll taxes, workers compensation insurance, and tax withholding. You determine whether the individual is an employee by assessing the degree of control the person using the services exercises.

2. When in doubt, classify employees as non-exempt. The law exempts certain types of employees from the overtime rules. One determines whether an employee is exempt by reference to job duties, not payment by salary or employer choice. There are three main types of exempt employees—executive, administrative and professional. All require that the employee (1) earn a monthly salary equivalent to at least twice the minimum wage (currently \$2,773), (2) customarily and regularly exercise discretion and independent judgment, and (3) be primarily engaged in exempt activities. The executive exemption is for those who manage a company or a customarily recognized department, and direct the work of two or more other employees. The administrative exemption is for those involved in office work directly related to management or general business operations. The professional exemption is for licensed professionals and those engaged in learned or artistic professions.

3. Understand the basic overtime rules. An employer must pay overtime for all hours over eight in a day, or over 40 in a week, at the following rates: Time and a half for all hours in excess of 40 in any workweek, all hours in excess of eight in a day up to twelve, and the first eight hours on the seventh consecutive day of work in a workweek. Double time for all hours in excess of twelve in a day, and in excess of eight on the seventh consecutive day.

4. Implement alternative workweek schedules. Employers may obtain relief from the rigidity of the eight-hour day by adopting an alternative workweek with workdays of up to ten hours, so long as the total hours in the week do not exceed 40. For the alternative schedule to be valid, two-thirds of the employees in the affected work unit must agree. There is additional flexibility available through exercise of the power to define the workday and the workweek. Combining an alternative workweek schedule with a workweek that begins at 12 noon on Friday would allow an employer to implement a 9/80 schedule, without paying any overtime.

5. Do not treat exempt employees like non-exempt employees. Exempt employees should receive their weekly salaries so long as they put in some time during the week, and are not idle for personal reasons. Employers pay exempt employees a regular salary to get the job done, whether it takes one hour or seven days. If you deduct pay from an exempt employees salary based on hours worked, you may destroy the exemption. There are two exceptions. (1) An employer may deduct from accrued sick and vacation time for absences under an established leave policy. (2) An employer may deduct for incremental leave granted

as family and medical leave. The rules for exempt employees do not prohibit the employer from rewarding exempt employees who work extra hours during the regular workweek. An employer may pay an hourly rate to exempt employees for hours in excess of eight hours in a workday or 40 hours in a workweek without destroying the exemption.

6. Determine the regular rate of pay correctly. The amount of overtime due depends on the rate of pay used for calculation. Under California law, you determine that rate by adding up all compensation paid during the week, subtracting bonuses, hours paid but not worked, and any paid overtime, and then dividing by the number of hours worked up to 40. The California approach differs from the fluctuating workweek authorized by the United States Department of Labor under the Fair Labor Standards Act. Under that method, you divide the total compensation by the total number of hours worked even if that number exceeds 40. There is no requirement that the employer use the same rate of pay for all hours worked. For example, an employer might pay for time spent on unproductive tasks at a lower rate.

7. Handle requests for make up time appropriately. Occasionally, employees may have personal obligations that occur during their regular working hours, and then wish to make up the lost wages by working extra hours on other days. The law allows employers to accommodate such requests, provided that (1) the request is in a signed writing, (2) the employer does not solicit it, (3) the time is made up in the same workweek either before or after the time missed, and (4) overtime is paid for all hours in excess of eleven in a workday or 40 in a workweek. The law distinguishes between makeup time (which is lawful), and compensatory time (which is generally prohibited). Compensatory time refers to a practice under which an employer gives paid time off in place of overtime compensation. For example, if a non-exempt employee worked 10 hours in a workday, the employer would not include time and a half pay in the paycheck, but would grant the employee additional paid time off.

8. Determine the number of hours worked correctly. You determine whether or not overtime is owed by figuring the number of hours that the employee has spent under the control of the employer. It includes time that employees were permitted to work, even if the employer did not require them to work. Although commuting time is not included, time that the employer controls the means of access to the worksite counts. The employer must pay for all time spent traveling for the employer's purposes. Be sure to include the ten-minute rest periods required for every four hours of work, standby time, employee education and training (unless it is voluntary, unrelated to the regular job, and outside normal work hours), and time spent changing clothes and washing up. You may exclude meal periods (provided that the employee is relieved of all duty), and recess periods of 30 to 120 minutes (if the employee is free to leave the employer's premises).

9. Handle vacation pay properly. When an employer offers vacation pay, it must follow certain rules established in the wage orders. Vacation pay is part of an employee's compensation. Once it has accrued, it is money in the bank for the employee. Under the Labor Commissioner's rules, employers must credit employees for accrued vacation on a daily basis. Although employers may not have a use it or lose it policy, they may enforce caps on how much vacation employees may accrue.

10. Administer sick pay properly. Sick pay is a benefit that many employers offer. Since use of sick pay depends upon the occurrence of illness and is not within the employee's discretion, the Labor Commissioner does not treat it like vacation pay. Employers may enforce use it or lose it policies, and may adopt any method of accrual that they choose. Any employer who offers sick pay must allow employees to use up to half their annual allotment for time off to care for their children, parents, spouses and domestic partners. The family and pregnancy leave statutes require employers to allow employees to use accumulated sick leave to pay for qualifying time off for their own health.