



James E. Griffis and Mac Smith

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Jim Griffis practices in the area of employment law. He advises clients on employment handbooks, employment agreements, covenants not to compete, confidentiality agreements, employment litigation, and other human resources issues that occur in the context of employment relationships.

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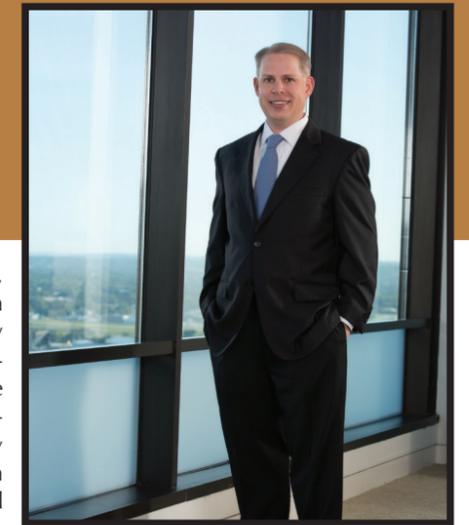


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## Working Through Common Employment Law Issues (part II)

By Jim Griffis, Attorney



### Fair Labor Standards Act 101

The Fair Labor Standards Act ("FLSA") is a federal law that establishes minimum wage, overtime, record-keeping, and child labor requirements for employees in private business and in federal, state, and local governments. Most people are familiar with the current federal minimum wage of \$7.25 per hour and the overtime rate of 1.5 times a non-exempt employee's regular rate of pay for each hour worked over 40 in a workweek. However, there is much more to the FLSA than just minimum wage and overtime. Here are some basic FLSA concepts, common mistakes made by employers, and consequences for making a mistake.

### Exempt vs. Non-Exempt Employees

The FLSA makes a distinction between exempt and non-exempt employees. Non-exempt employees must be paid at least minimum wage for each hour worked, and 1.5 times their regular rate of pay for every hour of compensable time worked over 40 hours per workweek (unless an overtime exemption applies).

Exempt workers do not have to be paid overtime, but must generally receive a minimum salary and perform certain duties. Some common exemptions are for executives (primarily management), professionals (attorneys, accountants, engineers, architects, etc.), highly-compensated employees (office or non-manual workers who make at least \$100,000), and administrators (HR, accounting, and public relations).

### Common Mistakes made by Employers under the FLSA

1. Misclassification of Workers. Employers sometimes misclassify an employee as exempt, rather than as non-exempt. Determining whether an employee meets a certain exemption can be difficult in some situations, and employers can often inadvertently misclassify an employee, resulting in a violation. For example, employers will often label supervisors as exempt, but if the supervisor's actual duties and salary do not qualify for an exemption, then there may be a violation of the FLSA.

2. Keeping Tipped-Employees' Tips. The FLSA permits employers to take what is known as a "tip credit" and credit tips received by an employee towards the minimum wage owed. For example, in restaurants, many waiters and waitresses will receive base pay less than minimum wage, and the employer will use tips received by the employee to bridge the gap between the base pay and minimum wage. An employer is not allowed to keep tips received by its employees. For example, if a waiter receives a base wage of \$2.13 per hour and \$10.00 in tips per hour, the employer can use \$5.12 of the tips as a credit towards the minimum wage owed the employee (e.g., \$2.13 + \$5.12 = \$7.25). The employer also keeps the remaining portion of the tip (e.g., \$4.88).

3. Improper Calculation of Overtime. The general rule is that all compensation an employee receives is included when calculating his or her overtime rate. There are a few

exceptions to the rule, and the burden is on the employer to show that the compensation meets one of these exclusions. For example, a non-discretionary bonus received by an employee is included when calculating an employee's overtime rate, but a discretionary bonus is not. It is not always easy to tell the difference between a discretionary and non-discretionary bonus.

4. Improper Deductions from Employee's Wages/Salaries. An employer should be careful when making deductions from a non-exempt worker's wages. If the deduction is not a permitted deduction and reduces the employee's wages below minimum wage, then this will be a violation of the FLSA. An employer can obviously make deductions for some items (such as the employee's share of social security and state unemployment insurances taxes), but not others (such as cash register shortages) if the deduction reduces the employee's wages below minimum wage.

Employers are also not permitted to make certain types of deductions from exempt employee's salaries. For instance, an employer generally cannot make a deduction for damage or loss to company equipment. Also, if an exempt salaried employee is absent from work for less than a full day, an employer cannot make a deduction from his or her salary.

### Consequences of Errors

The consequences of making a mistake under the FLSA can be costly. An employer can be investigated by the United States Department of Labor and assessed fines and penalties. An aggrieved employee can also bring a private action against an employer and recover back wages for 2 to 3 years, liquidated damages in an amount equal to the back wage award, and reasonable attorney's fees and costs. The employee can also bring a collective action lawsuit in which the employee and all similarly-situated employees pursue their claims together against the employer. In addition, some supervisors and managers can be held personally liable for FLSA violations. Needless to say, it is important for employers to comply with the FLSA.

This article is general in nature. If you need assistance in working your way through employment issues, you should contact an experienced labor and employment attorney. This article is for informational purposes only and not for the purpose of providing legal advice. You should contact an attorney to obtain advice with respect to any particular issue.

Jim Griffis is an attorney with Harris, Finley & Bogle, P.C. He concentrates his 15 year legal practice in labor and employment law. Mr. Griffis represents both employers and employees in various labor and employment matters.