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# Money matters

A wage and hour refresher **Interviewed by Curt Harler**

**W**hen The Fair Labor Standards Act (FLSA) was enacted in 1938, it was to ensure workers a living wage via the minimum wage requirement; to protect children from hazardous working conditions by limiting their working hours and prohibiting certain types of work; and to encourage more hiring via the disincentive of mandatory overtime pay. Record-keeping requirements were included to provide evidence of compliance, and there is a poster employers are required to display. Today, employers can find themselves in trouble by ignoring the law's requirements, incorrectly applying the rules, or failing to consider more protective state and local laws, says Audrey Mross, who leads the labor and employment practice group at the Dallas-based law firm of Munck Butrus Carter, P.C. We asked her to help steer us through the thicket of laws and regulations.

## Do employers only need to be mindful of the federal wage and hour law?

No. Employers who are not in interstate commerce will look to state law and possibly local wage and hour ordinances. Businesses in interstate commerce need to be aware of the requirements of all three. For example, if an FLSA-covered employer has employees in a state with a minimum wage that exceeds the current federal standard of \$5.85 per hour, the employee is entitled to the higher state minimum wage. You can find a complete list of state minimum wage rates at [www.dol.gov/esa/minwage/america.htm](http://www.dol.gov/esa/minwage/america.htm).

## Are there many such local ordinances?

Yes, and they are increasing in numbers, although last year's increase in the federal minimum wage may slow the spread. Years ago, these so-called 'living wage' ordinances applied to employers who did business with the local government. Today, many of these laws are not conditioned upon being a contractor with local government (see Albuquerque, N.M.). Instead, they may apply to any business within a specified geographic area (see Santa Monica, Calif.), and some have a two-tier approach, mandating a higher wage if the



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employer does not offer employee health insurance (see San Diego, Calif.).

## What about overtime pay?

Under the FLSA, an employee is entitled to 1.5 times the 'regular rate' for time worked in excess of 40 hours in a workweek. While that hasn't changed, several states, including Alaska, Calif. and Colo., and Puerto Rico and the Virgin Islands require overtime to be paid on a daily basis or at more than 1.5 times the regular rate. A bill in the 2007 session of the Texas Legislature proposed daily overtime for day laborers, but the measure was not enacted. We may see a similar bill in 2009.

## What is the workweek?

The employer defines its own workweek. It's a period of seven consecutive 24-hour days, which should be published in the employee handbook so that everyone knows when overtime is earned. In states with daily overtime, the workday should be similarly defined. Many employers mistake

only think overtime is paid at 1.5 times the worker's hourly or 'straight time' rate. That's correct if no additional pay, such as shift differentials or productivity and attendance bonuses, is offered. However, if other pay is received, those amounts are included in the regular rate upon which overtime is based. Don't let the exclusion for discretionary bonuses fool you; their definition of 'discretionary' is not the same as yours.

## What are other common employer mistakes?

One is misclassification of some contractors and nonexempts as exempt, which results in the failure to keep records of time worked and, often, failure to pay overtime. Once the misclassification is shown, there is usually no time record to rebut the worker's sometimes-inflated opinion of how many hours were actually worked, making back-pay settlement amounts unduly large.

A similar problem occurs when the employer fails to capture and pay for all time worked by nonexempt employees. This can happen where an employee works 'off the clock' due to improper recording of meal breaks and when work starts and stops each day. Employers should not automatically dock an hour of pay each day for lunch, unless agreed to in a collective bargaining agreement. They should not allow employees to work at home or come in early, unpaid, and chalk it up to 'showing initiative.' They should not use the 'manager override' feature on automated time-keeping systems to reduce recorded hours when they feel an employee goofed off or otherwise did not give a full day's work. They should know the acceptable 'rounding' practices under the FLSA. Here's a hint: If you're always rounding down, your practice is not permissible. Another hot area of debate is the compensability of time spent driving between home and first and last assignments of the day, for employees who work in the field out of their own cars or company-issued service vehicles. <<

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