



Assessing The Risk:

Wage and Hour Tip Of The Week

Ensuring Time Worked Counts Towards the Proper Workweek

Tip: Work performed by an employee on a single shift may fall into multiple workweeks, depending on when that workweek begins and ends.

Under the FLSA, overtime must be paid to non-exempt, covered employees for hours worked in excess of 40 hours in a “workweek.” A “workweek” is a fixed and recurring period of seven consecutive 24-hour periods. In other words, whenever a workweek starts, it ends 168 hours later; the next workweek ends 168 hours after that; and the next 168 hours after that. Once established, the workweek remains fixed for a group of employees until the employer affirmatively changes the workweek. A workweek ordinarily does not change from week to week.

For a few employers, the workweek is an issue that rarely, if ever, comes up. For many others, however, ensuring that work time falls into the proper workweek for the purpose of determining whether overtime is due can be a critical undertaking. Failure to properly account for shifts that cross over workweeks can result in overtime violations.

For example, assume that an employer establishes a workweek that starts at 12:00 midnight Sunday and ends at 11:59 pm on Saturday:

- an employee works a shift that begins at 8:00 pm on Saturday and ends at 4:00 am on Sunday. The first four hours of this shift would fall into the first workweek; the second four hours fall into the second workweek. Notably, this requirement may **not** be altered by an agreement to include all time worked in the workweek in which the shift starts (or ends).
- an employee works a shift that begins at midnight Sunday, but clocks in and begins work 15 minutes prior to shift start time. Even though the shift was scheduled for workweek #2, the 15 minutes prior to the start of the shift (and workweek) would be included in workweek #1. If the employee had worked (for example) 40 hours to that point in workweek #1, she would be due 15 minutes of overtime pay for starting work early.

In both of these cases, the employer likely established a schedule intended to minimize overtime compensation. In both cases, the employer may unexpectedly have incurred those overtime costs.

Employers with shifts that cross or straddle workweek start times should ensure that their scheduling practices take into account the requirement that time worked in a particular workweek must be included in the total hours for **that** workweek, regardless of any policy or practice that hours will be counted in a specified workweek. Overtime compensation must be calculated on the hours actually worked in the workweek.

The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

By [Alex J. Passantino](#)

[Alex J. Passantino](#) is located in Seyfarth Shaw's D.C. office. If you would like further information please contact your Seyfarth Shaw attorney or Alex Passantino at apassantino@seyfarth.com.

www.seyfarth.com



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