



Assessing the Risk:

Wage and Hour Tip Of The Week

How do you calculate day-rate overtime and when is it appropriate?

The attorneys in Seyfarth Shaw's Wage & Hour Litigation Practice Group provide the following tip to help ensure your good faith compliance with state and federal wage and hour laws:

If you are paying a non-exempt employee a fixed amount for a day's work regardless of the number of hours she works, you are likely paying her on a day-rate basis. The day-rate payment method is not an excuse to avoid overtime for hours worked over 40 in a workweek. To the contrary, day-rate employees are entitled to overtime pay, and you must track their hours in the same manner as other non-exempt employees. Under the FLSA, the first step in calculating overtime for a day-rate employee is determining their "regular rate," which is the total amount earned by the employee for a given week divided by the total number of hours the employee actually worked during that week. The second step is calculating the employee's overtime rate for that week, which is one-half their regular rate. Lastly, the overtime rate is multiplied by the number of hours the employee worked in excess of 40 hours during that week. Calculating day-rate overtime is appropriate when an employee receives no other form of compensation for her services. Sick days, paid vacation, and other fringe benefits are not considered "other compensation," and thus, do not preclude the application of the day-rate overtime calculation. Take steps to make sure that your day-rate employees are keeping track of the hours they work. If they are working over 40 hours in a given week, make sure they are being paid overtime. And please note, some states -- like California -- may not allow employees' overtime to be paid according to this method.

Disclaimer: 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.

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