

Salespeople and overtime

Treatment of inside salespeople under the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. Nearly all employees are covered by the FLSA unless they qualify for one of the exemptions.

Smart Business spoke with Michael B. Dubin, a member with Semanoff Ormsby Greenberg & Torchia, LLC, about the FLSA, why inside salespeople are commonly misclassified as exempt and the consequences of failing to pay overtime to non-exempt employees.

How are salespeople treated under FLSA?

Outside salespeople are exempt from the overtime requirements under the FLSA while inside salespeople are generally non-exempt and are required to be paid overtime for all hours worked over 40 in a workweek.

To qualify for the outside sales exemption:

- 1) The employee's primary duty must be making sales or obtaining orders or contracts for services, or for the use of facilities for which consideration will be paid by the client or customer; and
- 2) The employee must be customarily and regularly engaged away from the employer's place of business. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephone solicitation of sales is considered one of the employer's places of business.

Inside salespeople are those generally attempting to make sales over the telephone, internet or by mail. These employees are typically non-exempt and are eligible for overtime pay. However, in certain limited circumstances, an inside

salesperson may be exempt under the 'retail or service establishment exemption.' To qualify for this exemption, an employer must demonstrate that:

- 1) The employee works for a retail or service establishment;
- 2) The employee's regular rate of pay is at least one-and-a-half times the minimum wage; and
- 3) More than half of the employee's earnings in a representative period (not less than one month and not more than one year) are derived from commissions on goods or services.

A retail or service establishment is a business where 75 percent of its annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry.

Why do employers misclassify salespeople?

Many employers see no distinction between outside salespeople and inside salespeople since both positions are selling goods or services. As a result, many employers misclassify inside salespeople as exempt employees. When made aware of the misclassification, these employers often ask if they can direct the inside salespeople to go on the road a couple of days a month so they can be characterized as outside salespeople exempt from overtime. The



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answer is no, because an outside salesperson must be 'customarily and regularly' engaged away from the employer's place of business, which means greater than occasional, but less than constant. Therefore, this attempt to avoid paying overtime will be unsuccessful if challenged.

What is the penalty for failing to pay overtime under the FLSA?

If an employer fails to pay overtime under the FLSA, the employee has a private right of action and can seek any unpaid overtime going back two years from the date of filing the action. If the employee can prove the employer acted willfully in violating the FLSA, they may be entitled to overtime going back three years. The employee may also be entitled to liquidated damages, which can be up to the amount of the back overtime (it doubles the amount owed to the employee), as well as the recovery of attorneys' fees incurred in the action.

To keep abreast of FLSA requirements, it is prudent to have an attorney experienced in FLSA conduct a wage and hour audit every few years. This process will allow the attorney to review all job descriptions, the actual duties performed and the FLSA classification of each position to determine whether any employees or group of employees are misclassified and to rectify any such misclassification. ●