



COMMON WAGE & HOUR MISTAKES

WORKING HOURS

In general, "hours worked" includes all the time an employee is required to be on duty, on the employer's premises, or at a prescribed work place. "Hours worked" also includes all times an employee is permitted to work for the employer. This means that any work the employer permits, even though the employer does not request it, is working time.

For example, an employee may voluntarily continue working at the end of the shift. He or she may want to finish an assigned task, to correct errors, or to prepare time or production reports. The reason is immaterial; if the employer knows or has reason to believe that the employee is continuing to work, then that time must be counted as hours worked. This basic rule applies also to work performed away from the employer's premises or the job site, or even at home.

In all such cases, management has the right to exercise control and to see that the work is not performed if the employer does not want it to be performed. Management cannot sit back and accept the benefits without compensating for them. Merely declaring a rule against such work is not enough. Management has the power to enforce it and must make every effort to do so.

REST BREAKS AND MEAL PERIODS

An employer is not required to give employees a rest break or meal period. However, rest breaks of short duration, designed to promote employee efficiency and running under 30 minutes, are common in the foodservice industry. The time must be counted as hours worked. One note, breaks for nursing mothers to export milk are required and a private area, other than a restroom, must be made available for this purpose.

Bona fide meal periods during the scheduled workdays are not considered work time under the FLSA, and the employer need not pay employees for such periods. Ordinarily, 30 minutes or more is considered a bona fide meal period. In order for bona fide meal periods to be excluded from compensable working time, the employee must be completely relieved from duty for the purpose of eating regular meals. The meal period must be uninterrupted except for a rare or infrequent emergency call.

TIP CREDIT

The Fair Labor Standards Act (FLSA) requires that an employer pay employees at least the minimum wage prescribed by law. The same law permits employers in states that follow the

federal tip credit to take a tip credit equal to the difference between the minimum wage and the cash wage of \$2.13 per hour.

Requirements for Taking a Federal Tip Credit

Employers may not take the federal tip credit unless the following requirements are met:

1. A tip credit can be taken only against the wages of employees who customarily and regularly receive at least \$30 per month in tips.
2. The amount of the credit claimed can never be more than the employee actually received in tips or more than the prescribed percentage of the applicable minimum wage. To the extent that the tips received by an employee are less than the permitted tip credit, the employer must pay the employee the difference between the tips reported and the minimum wage.
3. The employer must notify tipped employees of the amount of tip credit taken. The DOL is particular as to what elements are required in the notice. Two examples follow at the end of this document.
4. Employees must be allowed to retain all of their tips. This requirement prevents the employer from retaining any of the tips or using any of the tips to pay for such things as uniforms, breakage or losses. This requirement does not prevent tip-pooling arrangements, as discussed below.

The employer must be able to prove that the employee received tips in an amount at least equal to the amount of the tip credit claimed. Employees' written statements are the best proof of tips received.

Tip Credit for Incidental Work

An employer take a tip credit for the time a server spends cleaning and setting tables, rolling silverware, making coffee or other activities directly related to preparation for serving customers. However, the U.S. Department of Labor takes the position that if servers are routinely assigned maintenance duties, such as floor cleaning, or if they spend more than 20% of their time performing general preparation work or maintenance, this is not tipped employment and the tip credit may not be taken for time spent on such work.

Tip Credit for Dual Jobs

When an employee works at two jobs, one of which is tipped (such as a server or bartender) and the other not (such as host/hostess or cashier), DOL regulations are clear. The tip credit can be taken only for the time worked as a tipped employee.

TIP POOLING

The FLSA says employers may not take a tip credit unless an employee retains all of his or her tips. This does not, however, prevent tip-splitting or tip-pooling arrangements among employees

who customarily and regularly receive tips, provided the participants are not required to contribute a greater percentage of their tips to the pool than is customary or reasonable.

Employers often ask whether it is possible for management to run a tip pool or participate in operating one. The answer is a qualified “yes” -- but employers should pay close attention to the following DOL guidelines on tip pooling:

1. The requirement that an employee retain all tips does not prevent tip-splitting or tip-pooling arrangements among employees who customarily receive tips. The following occupations have been recognized as falling within the eligible category: bellhops, waiters and waitresses (including cocktail servers), counter personnel who serve customers, busedpersons, and service bartenders.

It is not required that busedpersons or others who share in tips receive tips directly from customers. Both the amounts retained by the servers, for example, and those given to busedpersons are considered the tips of the individual who retains them.

2. A valid tip-pooling arrangement cannot require servers to contribute a greater percentage of their tips than is customary and reasonable. For enforcement purposes, the DOL will not question pool contributions that do not exceed 15% of the employee’s tips. However, *only tips in excess of the tip credit* may be taken for the pool.

If conditions (1) and (2) are met, the tip pool may be set up and supervised by the employer; it does not require the voluntary consent of employees involved. DOL policies also clarify the following regarding management-supervised tip pools:

Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip-pooling arrangements. Examples include: janitors, dishwashers, chefs, cooks and laundry room attendants.

In the case of hosts/hostesses, headwaiters and seaters/greeters, the type of establishment and local practices will determine whether or not such persons can participate in a tip pool.

In requiring even as a general principle that tipped employees retain all their tips, it does not appear that Congress intended to prevent tipped employees from exercising a free choice in deciding what to do with their tips. This includes the sharing of tips with co-workers of their choice in any amount they please.

When a tip pool established by the employer includes ineligible employees, the employer must reimburse those who contributed to the pool in an amount equal to the tips turned over to the ineligible employees, and it may not seek reimbursement from ineligible employees.

OVERTIME FOR TIPPED EMPLOYEES

Employers should be careful when calculating overtime for tipped employees. Employers should keep in mind that the law requires that an employee’s regular rate of pay -- that is, the rate used to determine overtime -- can never be less than the applicable minimum wage rate.

For example, take an employer who pays tipped employees the current federal minimum wage of \$7.25 per hour. Current federal law allows the employer to take a tip credit of \$5.12 an hour (\$7.25-\$2.13 cash wage) against the wages paid to tipped employees.

In this case, the overtime rate is calculated not by multiplying the cash wage of \$2.13 by 1.5, but

by using the following calculation:

$$\begin{array}{r} \text{Min. Wage} \quad \quad 7.25 \\ \text{Time and a half} \quad \underline{\times 1.5} \\ \text{Overtime rate} \quad = 10.875 \end{array}$$

$$\begin{array}{r} \text{New Min. Wage} \quad 7.25 \\ \text{Minus tipped wage*} \quad \underline{- 2.13} \\ \text{Tip Credit} \quad \quad = 5.12 \end{array}$$

$$\begin{array}{r} \text{Regular OT Rate} \quad 10.875 \\ \text{Minus Tip Credit} \quad \underline{- 5.12} \\ \quad \quad \quad \quad = 5.755 \end{array}$$

Rounded Tipped Employee Overtime Rate = \$5.76

OVERTIME IN MULTI-JOB SITUATIONS

Working At More Than One Site

Assume restaurants "A" and "B" are owned or controlled by the same person or group and that an employee works for restaurant "A" for 30 hours and for restaurant "B" for 20 hours.

Since the restaurants are owned or controlled by the same people, even though they have two separate names and maintain two separate payrolls, the employee is entitled to overtime for all hours worked after 40. If the two restaurants were owned or controlled by different persons or groups, then no overtime pay would be necessary.

Doing More Than One Type of Work

An employee's regular rate for a week in which the employee works at two or more different types of work which have different non-overtime rates of pay is the weighted average of the rates. That is, the employee's total earnings are computed to include the employee's compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.

In multi-job situations, the employer may take a tip credit but only for those hours the employee worked as a tipped employee.

OVERTIME EXEMPTIONS

The following is a summary of the U.S. Department of Labor's (DOL), regulations regarding overtime exemptions which are effective as of Aug. 23, 2004. To qualify as exempt, an employee must be paid on a "salary basis." This means employees must receive a pre-determined and fixed minimum salary that is not subject to reduction because of variations in the quality or quantity of work performed. Each pay period (either weekly or less frequently), the worker must receive a predetermined amount for any week in which the employee performs work, regardless of the actual number of days or hours worked

Employees must earn a minimum salary to be considered exempt from federal overtime-pay requirements. The minimum weekly salary level required for exemption is \$455 per week (\$ 23,660 a year). To be exempt, an employee must perform a job that primarily involves managerial, administrative or professional duties.

In the restaurant industry, many employees are exempt from federal over-time-pay requirements because they fall under the executive exemption, also known as the managerial exemption. An employee is considered an "exempt executive" if:

- (1) The employee's primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.
- (2) The employee customarily and regularly directs the work of two or more other employees or their equivalent.
- (3) The employee has the authority to hire or fire other employees, or his or her suggestions and recommendations as to the promotion, hiring, advancement, or any other change of status of employees are given particular weight.

The DOL provides an example relevant to the restaurant industry of an assistant manager who performs work such as serving customers, cooking food, stocking shelves and cleaning. The DOL says that performing such non-exempt work does not eliminate the exemption if the assistant manager's primary duty is management. It concludes: "An assistant manager can supervise employees and serve customers at the same time without losing the exemption."

The second major exemption from federal overtime-pay rules is for certain "administrative" employees. In general, the rules require that exempt administrative employees have a primary duty of "performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." Exempt administrative employees must exercise "discretion and independent judgment." The DOL elaborates that discretion and independent judgment must be exercised "with respect to matters of significance," which refers to the level of importance or consequence of work performed.

Professionals may be exempt from overtime-pay requirements if they meet certain duties tests and pass the salary-basis and salary-level tests. Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the professional exemption. The regulations caution that "the learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work." To qualify for the learned professional exemption an employee's primary duty must be the performance of work requiring advanced knowledge. The advanced knowledge must customarily be acquired by a prolonged course of specialized intellectual instruction.

SHORTAGE, BREAKAGE AND OTHER DEDUCTIONS

Except for the tip credit and the meal and lodging credit, the federal law permits no other deduction from the wages of a minimum wage employee. That means that losses from

shortages, breakage, walkouts and the like may not be deducted from the wages of a minimum wage employee, nor can a minimum wage employee be required to pay for such losses, directly or indirectly. For those employees being paid in excess of the minimum wage, deductions for such losses may be made, but only to the extent of the excess and only with the prior written consent of the employee. It is also important to note that tipped employees may not be required to pay for such losses from their tips.

UNIFORMS

What constitutes a "uniform" lets employers know whether they are responsible for providing and maintaining an employee's work clothes or whether the employees can be required to pick up those costs. The U.S. Department of Labor (DOL) offers no hard-and-fast rules to help foodservice operators determine whether work clothes constitute a uniform, but in its Field Operations Handbook offers the following guidelines:

If an employer merely prescribes a general type of ordinary, basic street clothing employees should wear while working, and permits variations in details of dress, the garments chosen by the employees would not be considered uniforms.

On the other hand, where the employer does prescribe a specific type and style of clothing to be worn at work—for example, where a restaurant or hotel requires a tuxedo, or a skirt and blouse and jacket of a specific or distinctive style, color or quality—such clothing would be considered a uniform.

More obvious examples of clothes that the DOL considers uniforms include uniforms required to be worn by guards, by cleaning and culinary personnel, or by personnel in hospitals and nursing homes. As a general rule of thumb, the more specific the employer's requirements for employee apparel, the more likely it is that the DOL will consider the clothing a uniform.

Employers who require minimum-wage employees to wear a uniform must pay for and maintain those uniforms. Employees are responsible for cleaning and caring for work clothes that do not constitute a required uniform. However, if an employee's work clothes do constitute a uniform, the employer must pay for the cost of cleaning that uniform.

There is one exception: If the uniform is of wash-and-wear material that can be washed and tumbled dry with the family wash, and does not require daily washing, special commercial laundering, ironing or other special treatment (such as dry cleaning), the employer is not required to pay for its maintenance. Important note: This exception does not apply in all cases. Employers must pay laundering costs for wash-and-wear uniforms in cases where the employer furnishes the employee with only one uniform.

Another problem confronts foodservice employers: To ensure that minimum wage employees return their uniforms when they leave, may employers require an up-front security deposit (before the employee begins working), or may the employer deduct a security deposit from wages? The answer is "no" for workers paid the minimum wage, including tipped workers who

are paid the minimum wage. Those deposits or deductions violate federal wage laws in cases where they reduce an employee's wage below the federal minimum wage.

If you take the tip credit you must give notice to your employees. The following notices may be used for this purpose:

VERSION A: WHERE THERE IS NO EMPLOYER-REQUIRED TIP POOL

NOTICE TO TIPPED EMPLOYEES

The U.S. Department of Labor requires employers to inform tipped employees of certain tip credit information. We are informing you of the following:

- The amount of cash wage to be paid to you per hour will be \$ [fill in hourly cash wage amount here].
- Assuming you have received a sufficient amount of tips to cover the tip credit, the amount of your tips per hour to be credited as wages will be \$ [fill in hourly tip credit amount here].
- You have the right to retain all the tips you receive, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips.

You are being provided this information in accordance with Section 203 (m) of the Fair Labor Standards Act. Please sign and date this notice.

Employee's Signature

(Date)

VERSION B: WHERE EMPLOYEES ARE PARTICIPATING IN AN EMPLOYER-REQUIRED TIP POOL

NOTICE TO TIPPED EMPLOYEES

The U.S. Department of Labor requires employers to inform tipped employees of certain tip credit information. We are informing you of the following:

- The amount of cash wage to be paid to you per hour will be \$ [fill in hourly cash wage amount here].
- Assuming you have received a sufficient amount of tips to cover the tip credit, the amount of your tips per hour to be credited as wages will be \$ [fill in hourly tip credit amount here].
- You have the right to retain all the tips you receive, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips. Your required tip-pool contribution or percentage is [fill in required tip-pool contribution amount/percentage here]. The tip credit being taken is only on the amount you actually receive and your tips will otherwise not be retained except for your contribution to the tip pool.

You are being provided this information in accordance with Section 203 (m) of the Fair Labor Standards Act. Please sign and date this notice.

Employee's Signature

(Date)