




Complying With Wage-Hour Laws and Employee Classification

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What's Been Going On?

- Election of Obama, which leads to...
- Appointment of DOL Secretary Hilda Solis
 - “Neglected, atrophied” and “pro-business backwater” under Bush
 - Has engaged in an aggressive campaign of identification, investigation and enforcement
 - Message loud and clear
“There is a new sheriff in town”

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- Last spring, the DOL rolled out several programs
 - “We Can Help” campaign
 - “Plan/Prevent/Protect” strategy
 - More stringent **misclassification** rules.
- Combined, these changes will mean that even the most proactive employers should expect to see an increase in FLSA-related complaints from employees.


Recent Trends

- Wage-hour **claims have tripled** since 1997.
- FLSA cases filed in federal courts rose almost 23% in the second quarter of 2010 which is an increase of 25% from the first quarter of 2009.
- Some class settlements exceed \$100 million.
- A total of 3,230 FLSA cases were filed during the first six months of 2010 which reflects a **6% increase** over the first half of 2009. This doesn't even include those matters that are addressed administratively or in the state courts.




DOL is targeting most vulnerable workers by:

- Targeting industries in which violations are most likely to occur;
- Pursuing corporate-wide compliance strategies to ensure employers take responsibility for their compliance behavior;
- Using penalties and sanctions to ensure future compliance among violators



The DOL's 2010 agenda includes increased audit and enforcement proceedings related to:

- “Off the clock” work
- Rounding time in the employer’s favor
- Meal period violations
- Preshift/postshift time
- Travel time
- Misclassification of employees as “exempt”
- Misclassification of independent contractors

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- DOL is planning to audit hotels, motels and resorts across the country beginning October 1, 2010.
 - The DOL has identified **hospitality as a “high risk” industry** and considers hospitality workers **“vulnerable workers.”**
 - Watch for payment for time worked, employee classification, overtime and minimum wage violations.

Wage and Hour Division Begins Issuing Administrator Interpretations

- On March 24, 2010, WHD of DOL announced that the Administrator will no longer issue definitive fact-specific Opinion Letters submitted by individuals and organizations.
- WHD will now issue “Administrative Interpretations” intended to be “general interpretations of the law and regulations, applicable across-the-board to all those affected by the provision in issue.
- In response to requests for opinions, WHD will provide references to statutes, regulations, interpretation, and cases that are relevant without an analysis of the specific facts presented.
- The first Administrative Interpretation was issued in March and addresses mortgage loan officers which we will be discussing later.

Recent Trends

- Claims being filed on almost a daily basis in our federal jurisdiction, e.g.:
 - *“Defendant forces the plaintiff and other customer service representatives to perform unpaid work before clocking in each day. This unpaid work, which consists of booting up the defendant's computer systems and initializing the defendant's numerous software programs, amounts to significantly more time than the defendant's three minute estimate, and can take 15 to 30 minutes a day if the defendant's computer systems are slow or not working”*



AGENDA

- What is "work"?
- Pay for all non-exempt work
- Proper classification of employees
- Misclassifying employees as independent contractors

What is “Work”?

- Basic premise of “work”
 - FLSA defines the term “employ” to include the words “suffer or permit to work”. Suffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally hours worked.

What is “Work”?

- “Work”
 - Includes “waiting for work”
 - Time which an employee is required to be at work or allowed to work for his or her employer is hours worked. A person hired to do nothing or to do nothing but wait for something to do or something to happen is still working.
 - The Supreme Court has stated that employees subject to the FLSA must be paid for all the time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business."

- **On-call time**

- Multiple DOL Opin. Letters recently
- Essential question: can employee use the time for his/her own purposes?
 - Location – on-premises, very close, etc.
 - Frequency of work calls
 - Ability to engage in activities

- **Karanjawala v. Assoc. Human Societies (NJ Court)**
- Zoo employee voluntarily resided on zoo property, worked three night shifts per week.
- During two of the shifts, he was required to be on premises to answer the phone and dispatch other resident employees to off-site emergencies, except when he specifically sought permission to leave the premises to perform an errand.
- During the third shift, he did not have telephone duty and could be “anywhere,” but he was required to personally respond to off-site animal emergencies, for which he carried a beeper and cell phone.
- The Court awarded the employee \$45,000 in overtime because it found he was **“engaged to be waiting”** during the first two shifts because he could not leave the property and was therefore entitled to be compensated. During the third shift, however, his movements and activities were not restricted, as he was only **“waiting to be engaged.”** Therefore, he was not entitled to overtime for the third shift.

What is “Work”?

- “Work”
 - Includes any “place of work”
 - Hours worked include all the time during which an employee is required or allowed to perform work for an employer, regardless of where the work is done, whether on the employer’s premises, at a designated work place, at home or at some other location.

What is “Work”?

- DOL position on “work”
 - It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed.
 - An employer cannot sit back and accept the benefits of an employee’s work without considering the time spent to be hours worked.
 - **Merely making a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so.**
 - Employees generally may not volunteer to perform work without the employer having to count the time as hours worked.

Concerns from the Virtual Office


- “*Blackberry time is work time*”
- Read/respond to after-hours emails/calls
- Conference call on the way home
- Remote access to the office
- “De minimis” exception

Concerns from the Virtual Office

- What about the exempt employee who is on an unpaid leave day?
 - Checks email for a ½ hour on an unpaid leave day – *he doesn't get paid for that ½ hour, does he?*

Concerns from the Virtual Office

- So how do you address these issues?
 - NEED to have a policy in place
 - Address the use of technology – who (just exempts?), when, how, etc.
 - How to document those hours
 - How to confirm those hours – electronic method, copy memo to supervisor ...
 - Consequences of non-compliance
 - Educate managers on the issue



In May 2010, a class of Chicago Police Sergeants filed a class action lawsuit alleging they should be paid for time spent using “PDAs” or other electronic communication devices.

In addition to other things, they claim Chicago PD required them to be on call 24- 7 to answer emails, voice mails and text messages.

• Meal periods

- Bona fide meal period not compensable
 - “Ordinarily 30 minutes or more”
 - Less than 20 minutes “specially scrutinized”
- “Must be relieved of duty”
- Not compensable merely because of infrequent, brief interruptions
- Okay to auto-deduct daily, so long as accurately recorded
 - Can be problematic though!
- Careful – nursing homes often have automatic lunch deductions – DOL frowning on this

- **King v. Heritage** (nursing home) (pending CD III. 2010)

Hundreds of employees filed a class action alleging Heritage's automatic meal break policy illegally deprived workers of overtime compensation because workers were often forced to work during their meal breaks.

Automatic deduction is legal but can cause problems: no pay for lunch, no pay for overtime

- **Catholic Health Initiatives-Iowa** (operates 38 skilled nursing facilities)
 - Security guards at Mercy Hospital locations in Iowa alleged that their meal periods should have been paid because they were never completely relieved from duty during meal periods and had to remain “present” at the hospital to deter misconduct and respond in the event of an emergency.
 - The court rejected this argument and held that an employee does not have to be “completely relieved from duty” for a meal period to be non-compensable. Instead, to be compensable, a meal period must be spent predominantly for the benefit of the employer.
 - Examining the totality of the circumstances, the court analyzed the activities of the security guards during meal periods and the frequency of interruptions and concluded that the guards spent their meal periods predominantly for their own benefit:
 - (i) they were required to remain on-site
 - (ii) they “were able to enjoy their meal periods in either a break room, office, or squad room, in an environment conducive to reading, studying, or relaxing, and with virtually unlimited access to every form of electronic entertainment and communication.”
- In addition, the court emphasized, the hospital had a system, which all of the plaintiffs knew of, and which two of the three named plaintiffs had used, to compensate security guards when they were unable to have an uninterrupted meal break.

- **Easy targets** -employers hard pressed to prove no compensable work occurred and that meal breaks were exactly the same time period every day.
- Similar cases filed in Pennsylvania, Tennessee, Missouri, Massachusetts, New York and Illinois.

- Breastfeeding breaks
 - **Patient Protection and Affordable Care Act ("PPACA")**, requires employers subject to FLSA provide an unpaid break for mothers to express breast milk for one year after the birth of a child.
 - In addition to requiring an unpaid break, the amendment to the FLSA, entitled "Reasonable Break Time for Nursing Mothers," also requires the employer to provide a place for the employee to express her milk in a location that is shielded from view and "free from intrusion from co-workers and the public," other than a bathroom.
 - Potential exception for "undue hardship"

- “Off the clock”

Rutti v. Logack Corporation (9th Circuit)

3 separate opinions!!

Rutti worked out of his home driving a company vehicle to customer sites to install and repair vehicle recovery systems. He sued for compensation for time spent traveling from home to first customer and from last customer back home (commute time) and for “off the clock” work he did before he left in the morning and at the end of the day.


- Majority concluded that the commute time was “subject to the employer’s control” making it compensable under California law because he was required to use the company vehicle and was not permitted to make personal stops or engage in personal activity. The third judge disagreed.
- Majority also concluded that he should not be paid for his work before he left the house because it was “de minimis” (it only took a few minutes) but that he should be paid for his work when he got home (reporting on the computer) because it often took 15 minutes and was integral and indispensable” to his job.

- **Best Buy** (February 2010)

- Requested approval of a \$900,000 settlement in New York. Employees sought payment for time worked “off the clock.” The working time was the minutes spent going through security clearance at the end of the work day, assumedly to ensure that employees did not steal anything during their shifts.
- Best Buy denied liability but agreed to modify its operating procedures to allow all employees to remain on the clock until their manager allows them to leave the store.

- **Lululemon** employees have asked for class certification in a suit alleging the athletic apparel maker failed to pay wages for work performed outside normal shifts that included workers watching inspirational DVDs and taking exercise classes.
- They allege Lululemon required them to participate in one exercise class per week and “strongly encouraged them to show up for any many as three. Lululemon also required them to watch inspirations DVDs at home and attend 2 hours staff meeting as least once a month.

- **Kellogg Co.**
- 6th Circuit (covers Ohio) sent part of a dismissed suit back to district court to consider whether the plaintiff employees' time spent walking from a changing area to the time clock was significant enough to be counted as "time worked."
- Kellogg requires hourly employees to wear company uniforms and requires that they change at work. Dist. Court correct they weren't entitled to pay for time dressing and undressing but time spent walking to the changing room was another matter. Is it de minimus?
- Union approved it.



Proper Classification Of Employees (Exempt/Non-Exempt)

Exempt v. Non-Exempt

Exempt Employees –

- Executive, administrative or professional employees
- Outside sales people and certain employees performing computer-related functions
- Not entitled to overtime pay
- May be regular full-time, regular part-time or temporary employees.

“White Collar Exemptions”

- Executive
- Administrative
- Professional;
- Outside Sales capacity
- Certain computer employees may be exempt under professionals
- 20% owners

TESTS

- Salary (Pay) Level
\$455 per week
Highly compensated (total annual at \$100,000)
- Pay on salary basis (some exceptions)
Limited deductions
- Job Duties

EXEMPT VS. NON-EXEMPT - PROFESSIONALS

- **Registered Nurses** (doing registered nurse work)
- **LPN's** are *not* exempt as professionals
- **Dental Hygienists** who have 4 years of college can be
- **Nurse Practitioners** are exempt but must be paid on salaried basis unlike doctors
- **Physician's Assistants** who have 4 years of professional study and are certified
- **Certified Occupational Therapist**-(certification requires 60 semester credits) *not* professionals but registered or **certified Medical Technologists** *are* professionals (3 academic years)

EXEMPT VS. NON-EXEMPT - PROFESSIONALS

- **Paralegals** are generally not exempt professionals
- **Engineers?**
- **Accountants, CPA's** and others so long as performing accounting and not routine bookkeeping work
- **Chefs** – 4 year culinary arts degree (not cooks who perform manual, mechanical or physical work)
- **Athletic trainers** – 4 year degree and certified
- **Funeral directors or embalmers** – 4 year degree and licensed
- **Journalists** – depends on whether primary work includes invention, imagination, originality or talent

Exempt v. Non-Exempt (Administrative)

- **Insurance claims adjusters** - depends on level of responsibility and whether they can determine liability, value of claim, negotiate settlement and make recommendation regarding litigation
- **Insurance Agents** - Can be outside sales or Administrative

Administrative

Financial Services - An employee whose primary duty is to sell financial products is not exempt under the administrative exemption (can be outside sales here)

Consider: collect, analyze information regarding customer's income, assets, investments or debts; determine which financial products meet needs; advise regarding advantages and disadvantages of products; marketing, servicing and promoting products

JP Morgan Chase – 2010

- Second Circuit ruled that a former loan underwriter was not exempt from overtime pay as an Administrative employee because his primary duty-selling loan products under detailed directions provided by Chase and at Chase's offices-involved production, not administrative, work.
- The loan underwriter did not perform work directly related to the management policies or general business operations" so as to qualify for the exemption. Rather, he was a "production worker."
- The court explained that what determines whether an employee meets the exemption is the DUTIES, not the monetary value of the loans or the employee's salary. The primary duty was the production of loans.

- **Apple Inc.** (January 2010) agreed to pay almost \$1 million to settle a wage-hour class action (employees alleged the company improperly classified its network engineers as administrative employees)
- **Staples** (January 2010) agreed to a \$42 million settlement (overtime pay for current and former assistant store managers who were improperly classified as exempt)
- **Merrill Lynch** (February 2009) \$43.5 million (failing to properly compensate financial advisers-misclassification)

- DOL Administrator's Interpretation No. 2010-1 (March 24, 2010)
- A detailed analysis and interpretation that employees who perform the typical job duties of a **mortgage loan officer** do not qualify as bona fide exempt Administrative employees



DOL regulations:

Employees in the **financial services industry** will generally satisfy the duties test if they perform:

- Work such as collecting and analyzing information
- Regarding the customer's income, assets, investments or debts:
- Determining which financial products best meet the customer's needs and financial circumstances;
- Advising the customer regarding the advantages and disadvantages of different financial products;
- And marketing, servicing or promoting the employer's financial products

However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

- 29 CFR 541.203(b)

Reiseck v. Universal Comm. (2nd Cir.)(2010)

- The court concluded that the primary duty of a regional director of advertising sales for the Elite Traveler magazine was not exempt under the FLSA as an administrative employee.
- The employee was not involved in the market creation work but was instead selling advertising space and sales were a critical source of revenue. The space was a “product” and she was involved in “production.” She was selling not promoting sales generally (marketing).

MORE EXAMPLES: Administrative

- **Purchasing Agent** – can they bind company
- **Executive Assistant or Administrative Assistant** to owner or senior executive
- **Human Resource Manager:** Formulate, interpret or implement policies –generally meet administrative exemption

Young v. Cooper Cameron Corp. (Nov.09-2nd Cir.)

- Individual performed engineering design work on sophisticated equipment. He designed hydraulic power units for oil rigs. He never went to college but he had 20 years experience in various engineering positions. Court ruled he was incorrectly classified as an exempt professional. Fell on absence of college degree in specialized field of training.
- Regulations state - a professional is someone “[w]hose primary duty consists of the performance of [w]ork requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.” 29 C.F.R. § 541.3(a). Labels such as “engineer” and the like are not persuasive as the court noted that there are many engineers who do not hold advanced degrees.

Young v. Cameron Cooper Corp. (Cont'd)

- In this case, none of the product design specialists employed by Cameron Cooper had advanced degrees. They were all high school graduates with no college training. Since the work of a product design specialist at Cooper Cameron did not customarily require a prolonged course of specialized intellectual study, the Court held that Young was misclassified as a professional and therefore entitled to overtime pay.

Executives

- Retail Managers – can be
Careful – working or relief supervisors
- Supervisors v. working foremen
- Third Key – rarely exempt

Outside Sales

- **Pharmaceutical Sales Reps**
Class actions-are they selling or “promoting”
- Detailed analysis can
 - can they “sell”?
 - are they administrative

- **Novartis Pharmaceuticals Corp.**
- Cannot sell drugs directly to patients but sell to wholesalers who sell to pharmacies
- Sales calls on physicians-provide information
- Comp average \$91,539 in 2005
- Not “outside sales”
- Could not obtain orders, form contracts or engage in sales
- Second Circuit-promotional work incidental to sales made by someone else is not outside sales (July 2010)
- **Other courts have decided differently**

Misclassification of Independent Contractors

“Misclassification Initiative”

- The IRS, DOL and Ohio Attorney General have all announced their intent to increase enforcement efforts targeting employees misclassified as Independent Contractors
- A report issued by the Ohio Attorney General's office estimated that the extent of annual costs to the state from worker misclassification totals \$100 million in payments for unemployment compensation, more than \$510 million in BWC premiums and almost \$180 million in forgone state income tax revenues.
- 2009 Study entitled “Broken Laws, Unprotected Workers” by researchers from Cornell and Rutgers opined that workers in New York, Chicago and LA lose an average of 56 million dollars per week from employer wage violations. 68% of the workers claim they are denied overtime pay.
- Certain states enacting “wage theft” statutes providing for enhanced penalties from misdemeanors to felonies.

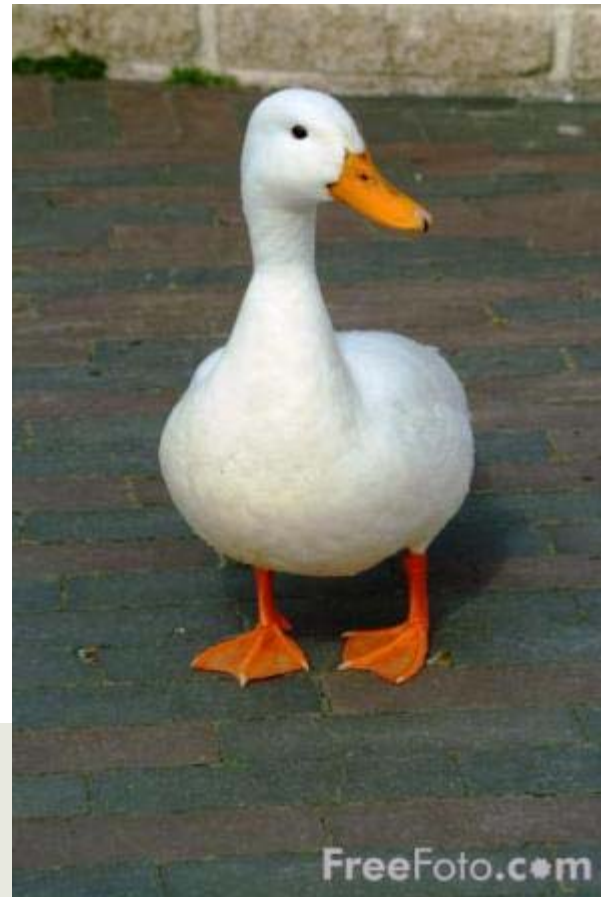
“Misclassification Initiative”

- The IRS and DOL has joined forces to eliminate incentives to classify employees as ICs and impose penalties upon those who misclassify (both ICs and exempt/non-exempt)
- \$25M earmarked to this effort and almost 100 new investigators for this effort alone
- Estimated re-capture of \$7B in lost payroll tax over 10 years!

- IRS will be auditing 6000 companies over the next 3 years
- Main issues are
 - worker classification,
 - executive compensation, and
 - taxable fringe benefits

- **IRS and DOL favor classifying workers as employees**

“Looks like a duck,
walks like a duck
quacks like a duck”



IRS 20 Factor Test

1. Instructions
2. Training
3. Integration
4. Services Rendered Personally
5. Hiring, Supervising and Paying Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full Time Required
9. Work Performed on Employer's Premises
10. Order or Sequence Set

IRS 20 Factor Test

- Oral or Written Reports
- Payment by Hour, Week, Month
- Payment of Business and/or Traveling Expenses
- Furnishing of Tools and Materials
- Significant Investment
- Realization of Profit or Loss
- Working for More Than One Firm at a Time
- Making Service Available to General Public
- Right to Discharge
- Right to Terminate

DOL Uses “Economic Reality” Test

- The test focuses on the degree of economic dependence of the would be employee on the business with which she is connected.
- The more the worker financially relies on the business, the more likely an employment relationship exists.

Courts consider:

1. Degree of employer's right to control the manner in which the work is performed
2. Degree of skill required to perform the work
3. Worker's investment in the business
4. The permanence of the working relationship
5. The worker's opportunity for profit/loss, and
6. The extent to which the work is an integral part of the business
7. **CONTROL, CONTROL, CONTROL** is the key

Recent Developments

- February 2010 - UPS agreed to pay \$12.8 million to settle a class action lawsuit over the company's alleged misclassification of delivery drivers it classified as independent contractors rather than employees.
- According to the drivers, UPS controlled almost every aspect of the working relationship.

- **In Hopkins v. Cornerstone America, 2008 WL 4542491,**
- Cornerstone America sells various insurance products through a pyramid system of about 1,200 sales agents, each of whom works as an independent contractor on a commission basis. The company also has “sales leaders,” who are sales agents promoted into leadership roles to manage the sales agents. The company treats these sales leaders as independent contractors even though their primary responsibility is recruiting, training and managing a team of subordinate sales agents.
- The Fifth Circuit addressed whether sales leaders were properly characterized as independent contractors.
- The trial judge held that the sales leaders should have been characterized as employees and that the sales leaders who sued could proceed with their collective action against the company for overtime wages. The court held that as a matter of economic reality, the sales leaders were dependent on the company to such an extent that they could not plausibly be considered to be in business for themselves. It found significant that the company controlled the foundation of the sales leaders’ ultimate success – the hiring, firing, assignment and promotion of the subordinate sales agents on whom the sales leaders relied for their own compensation. In light of the sales leaders’ economic dependence on the company for their livelihood, they were employees for purposes of the FLSA.

- **Awuah v. Coverall North America, Inc., (US DC Mass.)**
- A cleaning service company had improperly classified a group of franchisees as independent contractors under Massachusetts law.
- Coverall was a janitorial cleaning service business that sold franchises to thousands of franchisees across North America. Coverall required all of its franchise owners to complete mandatory training programs and wear approved uniforms and identification badges; provided all of the initial equipment and supplies to its franchisees; had the exclusive right to perform billing and collection services; was entitled to management and royalty fees and until May of 2009, also contracted directly with customers unless the customer specifically requested a direct contract with the franchisee.
- Franchisees sued Coverall alleging that they were misclassified as independent contractors and owed wages and overtime.]
- Court held that under **Massachusetts law**, they were employees.

- **Splicer was Independent Contractor**

- Thibault owned a business in Delaware selling picnic tables, storage tables and golf carts; he also owned rental properties. When hurricane Katrina seriously damaged the telephone infrastructure of BellSouth's grid, Thibault and his friend, an experienced cable splicer drove their RV to Louisiana to perform splicing work on behalf of BellSouth to rebuild the grid. Thibault had never worked as a splicer although he had experience as a naval aircraft mechanic and easily learned how to splice.
- Thibault and his friend worked 14 days shifts (13 days on with 1 day off) 84 hours per week; received a fixed hourly wage (\$68 per hour) and were required to provide their own trucks and tools. BellSouth decided what jobs would be done daily. Thibault received his daily assignments from a BellSouth contractor. Thibault earned \$51,628 during the three month period. After he was released he sued BellSouth and its contractors for unpaid overtime claiming he was an employee rather than an independent contractor.
- The trial court concluded that Thibault was an independent contractor. A panel of the Fifth Circuit Court of Appeals affirmed the trial court decision. Applying the economic realities test, the panel found Thibault was not an employee. Significant to its decision was the fact that:
 - Thibault owned his own business and therefore did not work exclusively for BellSouth and its contractors;
 - Thibault intended to work on 7-8 months and then return to Delaware;
 - Defendants considered him an independent contract and many other splicers also considered themselves contractors;
 - Splicing required little skill and initiative as evidenced by the fact Thibault learned it in one evening;
 - Thibault continued to oversee his primary business during the three months he performed splicing work

Common Mistakes

Common Mistakes

- Unauthorized overtime
 - True or false?
 - A supervisor specifically tells an employee not to stay after the end of her shift to finish up a certain task because it will put the employee into overtime but the employee does so anyway. Because the employee disobeyed a directive, the Company does not pay need to her overtime.
 - **FALSE.**
 - The time must be paid as overtime. However, the Turnpike may discipline the employee for her actions.

Common Mistakes

- **Waiting Time**
 - True or False?
 - Employee clocks in at the beginning of his shift and is waiting to receive instructions from supervisor on his daily tasks while drinking coffee in the breakroom. The Company does not need to compensate the employee for this “waiting” time.
 - False.
 - Keep in mind: “engaged to wait” versus “waiting to be engaged”
 - Waiting time is not work time when employees are completely relieved of duties, the period is long enough to use for their own purposes and they do not have to work until a defined hour.

Common Mistakes

- Volunteer time
 - True or false?
 - If an employee truly volunteers to spend extra time working on a project, the time does not have to be compensated.
 - FALSE
 - If an employee works extra time, whether “volunteering” or not, he must be compensated.

Common Mistakes

- Unpaid summer interns
 - True or false?
 - We can bring on a non-paid intern for the summer to cover for someone we just laid off?
 - FALSE. The program must be for the benefit of the intern and not to “displace” or do the work of a regular employee. There must be no “immediate advantage” to the employer – e.g., cannot stuff envelopes or manufacture product.

Other Common Mistakes

- Calling someone “salaried” and assuming they are then exempt from OT
- Failure to pay OT at proper rates
 - Bonus factor – is it really discretionary?
- No compensatory time for private employers unless within the week
- Travel time

Other Common Mistakes

- Employee “waivers” of overtime pay
- No pay for training, orientation or company meetings
- Union members exempt from FLSA
- Overtime for more than 8 hours in a day
- No need to pay overtime if employee works 50 hours in one week and then only 30 in the next week



Questions?