

The Legal Brief

Danger May Lurk Under The Dock Of The Pay

by Steven Mitchell Sack

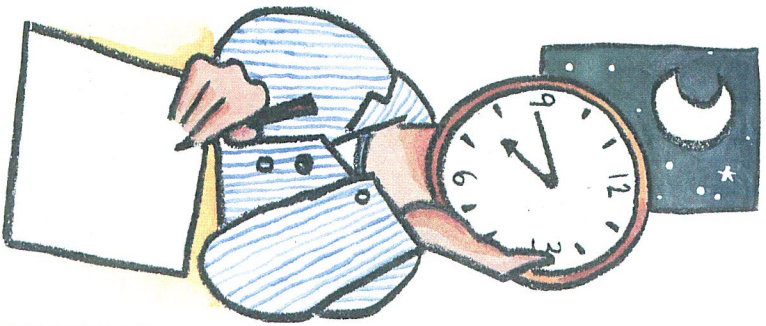


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Recent changes in federal overtime rules may make employers liable for back pay judgments if they grant salaried workers part-time unpaid leaves or dock them for taking time off. Here are ways to minimize the potential financial dangers lurking in these new regulations.

Most printing companies understand the basic federal rules regarding overtime, but fewer may be aware of recent U.S. Department of Labor regulations that can penalize employers who grant partial day unpaid leaves of absence for salaried workers.

Such lack of knowledge may have some very costly consequences. In one recent case, an employer had to remit \$875,000 in overtime back pay to its entire work force because it permitted some employees to take unpaid part-time leaves.

The *Fair Labor Standards Act* provides that, for any time worked in excess of 40 hours per week, an *hourly worker* must be paid at a rate not less than one-and-one-half times the regular rate that employee earns. Exempted from this overtime requirement are employees classified as "employed in a bona fide executive, administrative, or professional capacity."

Typically, a *salaried professional* is not entitled to receive overtime pay. Employers utilizing compensatory plans and policies that offer unpaid leaves to these professionals may be making costly mistakes.

Some Plans Are Illegal

Simply stated, compensatory plans are illegal if they allow workers time off without pay in the work period following one in which they worked excessive hours, or allow them to work more than 40 hours one week to make up for working less than 40 hours in a previous week. (For most occupations, each work week must be considered separately in determining overtime hours, regardless of the

length of the pay period.)

With respect to partial or full day unpaid leaves, the Department of Labor ruled recently that if a company allows or requests salaried professional employees to take time off without pay, the workers automatically become *hourly employees!*

The same is true for companies that dock salaried employees who take time off. For example, if a company docks a sales manager for taking a day off, it then owes him overtime for all the hours over 40 that were worked in a given week.

"One employer paid \$875,000 in overtime back pay."

And there's an even more severe consequence, for once *any* professional worker is classified as hourly, the company is liable for all overtime incurred during the past two years—not only for that employee, but for *all other similarly situated employees*. Thus, in another case, a company that docked a worker \$3,300 was ordered to pay damages of near-

ly \$750,000 to him and 23 other employees.

A \$35 Billion Liability

The consequences of this ruling are far-reaching, for experts estimate that corporate liability in this area has the potential to exceed \$35 billion. (Note: The policy concerning occasional partial or full day leaves is an exception to the long-term leave requirements of the federal *Family and Medical Leave Act*.)

In light of the ruling, printing companies may want to consider suspending, except in cases of family emergencies, any partial or full day unpaid leaves for salaried professional workers who want to take time off for a brief medical visit, to attend a child's recital, etc. Above all, rethink any flexible work arrangements and "time off without pay" policies.

If your company has offered compensatory leave plans such as those described above, speak to your attorney immediately, or anonymously contact your state's labor department or the Wage and Hour Division of the U.S. Department of Labor for a verbal opinion. ■

To Exempt Or Not To Exempt, That Is The Question

It is important to classify employees correctly as exempt or non-exempt from overtime compensation since the penalties for an error can be stiff. The exemptions under the *Fair Labor Standards Act* are narrowly construed against the employer, who bears the burden of proving such employees are exempt.

If you classify employees as executives, for example, their primary duty must consist of the management of the enterprise (defined as work requiring the exercise of discretion and independent judgment) *and* the regular direction of two or more employees.

The exemption for creative professionals requires

that their primary duty is work that is original and creative in character, the result of which "depends primarily on the invention, imagination, or talent of the employee."

Significant damages can be awarded in the event of an error in exemption classification. The act makes employers who fail to pay required overtime compensation *and* an equal amount as liquidated damages, *plus* attorney fees and costs.

Damages also include all earned overtime up to two years (ordinarily) or three years back (in the event of a willful violation finding), plus potential punitive damages.

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