



THE  
**LORE LAW**  
FIRM

# 10 Reasons You're Not Getting Paid Overtime

When You Should Be

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# You Have Been Misclassified as an Independent Contractor



# 1. You Have Been Misclassified as an Independent Contractor

## What is Independent Contractor Misclassification?

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Independent contractor misclassification occurs when workers who should be considered employees are instead classified as independent contractors (1099 employees).

1099 employees are considered to be in business for themselves, rather than direct employees who are subject to the control of an employer. As a result, they do not enjoy any of the typical privileges and protections that are guaranteed under the Fair Labor Standards Act (FLSA).



By avoiding the additional pay and benefits to which employees are entitled, a company can save substantial payroll expenses and gain an unfair business advantage over competitors who do comply with the law and properly classify workers as employees.

## How can I tell if I am misclassified?

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Only certain types of workers are meant to be classified as independent contractors.

**According to the IRS:**

*“The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.”*





If you are classified as an independent contractor, here are some signs that you may be misclassified:

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1. Your employer can direct, control, and schedule your efforts.
2. Your employer provides all the tools that you work with every day.
3. Your earnings are a set amount and you cannot realize either profits or loss.
4. You have been trained to perform work in a certain way that is unique to your employer's systems or operations.
5. You have a permanent relationship with your employer that exists between jobs and projects.

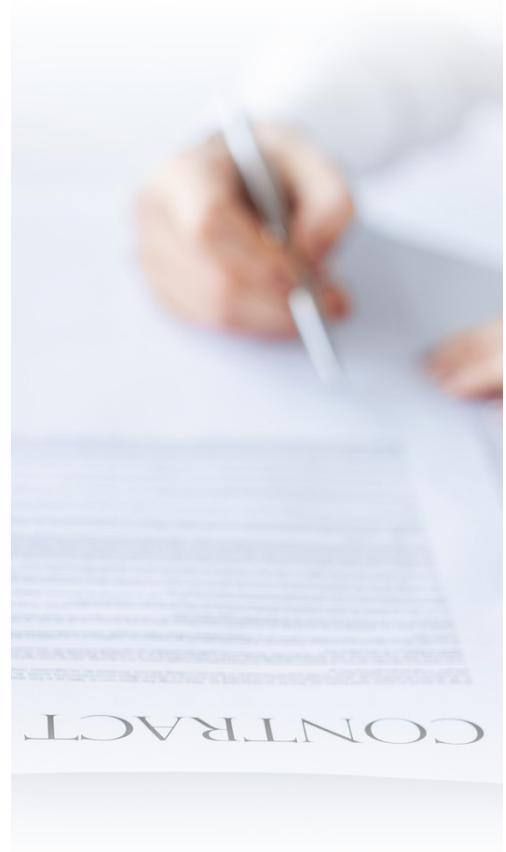
A contract stating that you are an independent contractor is not enough to qualify you as a 1099 worker.

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Regardless of what has been agreed to, in writing or otherwise, the economic realities of your specific facts and circumstances will determine if you are actually an independent contractor or an employee.

Employers are not allowed to use contracts to avoid the laws governing the proper classification of workers. No piece of paper that you were required to sign changes the rules and regulations that determine who is and is not an employee.

*If you have been misclassified as an independent contractor, you are likely missing out on important rights and benefits. Employers who deprive you of these protections and privileges do so in order to save money, at a significant cost to you. If you believe that you have been misclassified or would like to get more information, please call us at **1-866-559-0400**, or submit your information using our convenient [Case Evaluation Form](#) for a **FREE and CONFIDENTIAL** review of your circumstances.*



# Your Employer Has Misclassified You As Exempt to Avoid Overtime Pay.



## 2. Your Employer Has Misclassified You As Exempt to Avoid Overtime Pay.

### Overtime Exemption Misclassification

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An employee is given the title of Assistant Manager or some similar “managerial” job title and classified as exempt from the overtime laws (meaning they are not paid overtime), but their duties and responsibilities do not involve any meaningful decision-making authority or supervision of other employees, or their compensation method fails to meet the minimum requirements under federal or state overtime law. The issue of misclassification of non-exempt employees as exempt employees to avoid paying overtime occurs in all types of industries, but has been particularly problematic for workers in the banking and financial services arena.

### Who Is Legally Exempt

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The Department of Labor defines who is exempt in an executive or administrative position based on a combination of the salary and the duties performed. If an assistant manager is paid at least \$455\* (\$684 as of 1/1/2020) per week in salary, he or she can be classified as exempt as long as the duties performed fall within the definition of management, including all of the following:

- Supervision of two or more full-time equivalent employees; primary duty of managing all or part of the enterprise; and either authority to hire or fire employees, or meaningful input into the decision to hire or fire employees.

Or if their duties are administrative, including all of the following:



*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; and primary duty includes the exercise of discretion and independent judgment with respect to important business decisions.*



If these duties tests are not met, the employee should not be classified as exempt. Further, the “primary duty” requirement means that is the most important part of the employee’s job, but not necessarily what takes most of their time. The Department of Labor recognizes that this is a question whose answer depends on the facts of a given employment situation. Management, though, is defined based on duties of supervision, organization, budgeting, scheduling, and other aspects of running a department or organization, rather than performing day-to-day work there.

### 3. Your Employer Thinks Salaried Employees Do Not Get Overtime

Many employers will say “If you are paid a salary you are not entitled to receive overtime pay.” If you have heard this from an employer, you are not alone. However, this is not necessarily true. The way an employee is paid does not determine their right to overtime pay. Rather, it is an employee’s job duties that determine if they are exempt from the overtime rules. Even if you were told that you would be paid a certain salary regardless of how much you work, you may still be entitled to overtime pay.

Many employers claim that all salaried employees are not entitled to overtime pay. This is not true. There are 2 categories of employees – exempt and non-exempt. Exempt employees are those who, due to their job duties, are not legally entitled to overtime and are, therefore, “exempt” from the laws regarding overtime pay. Some salaried positions can be exempt depending on the position’s job duties. While some salaried positions may be exempt, the job position must meet specific exemption criteria for the position not to be entitled to overtime pay. There are 3 common overtime exemptions that require an employee to be paid on a salary basis:



**Executive Exemption**

**Administrative Exemption**

**Professional Exemption**

If you are paid on a salary basis but do not have the job duties listed under one of these exemptions, you are likely a non-exempt salaried employee and entitled to overtime pay. However, if the position does not have the specific job duties listed for one of these exemptions, the employee will be entitled to overtime pay – even though they are paid a salary. *If you believe that you have been denied overtime pay or would like to get more information, please call us at 1-866-559-0400, or submit your information using our convenient [Case Evaluation Form](#) for a **FREE and CONFIDENTIAL** review of your circumstances.*





**Your Employer  
Had You  
Work Off-the-Clock,  
Through Breaks/Lunch  
for No Additional Pay.**



## 4. Your Employer Had You Work Off-the-Clock, Through Breaks/Lunch For No Additional Pay.

The law requires that employers accurately track the hours worked by non-exempt employees and that they pay for all hours worked. When employers fail to pay employees for all of the hours they work, employees are denied a fair day's wage for a fair day's work. Improperly accounting for hours worked is a serious violation of an employer's duty and a violation of the Fair Labor Standards Act. These types of violations typically involve either "off-the-clock" unrecorded work or improper deductions from time that has been recorded.

### What are Improper Time Deductions or Docking?

When pay for time worked is illegally taken from a worker, it is known as improper time deduction or docking.

#### *Examples include:*

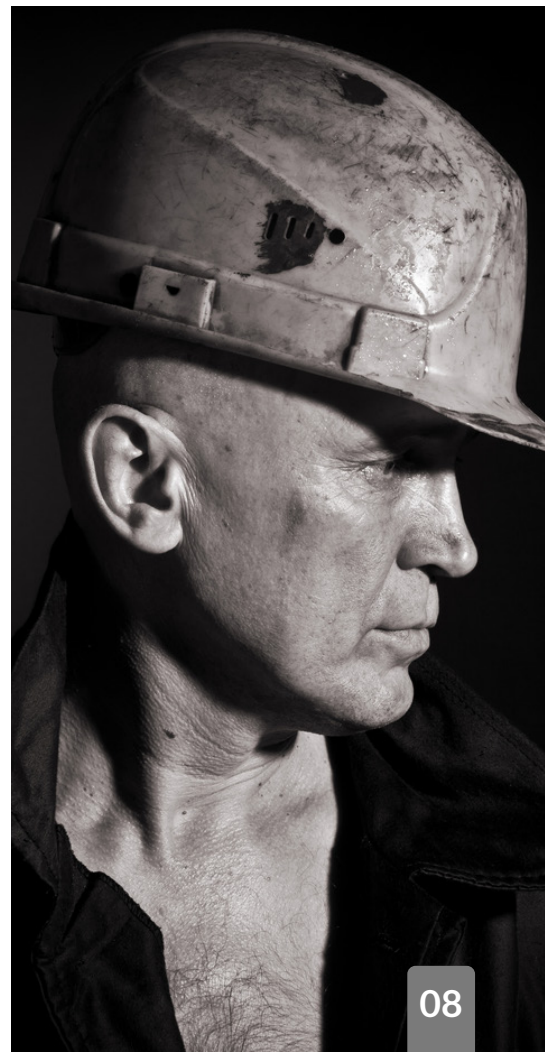
- Automatic deductions for meal or rest periods that are not actually taken or allowed deductions from recorded time for pre or post-shift duties.

### What is "Off-the-Clock" Work?

Off-the-clock work are essential tasks performed by an employee or worker without receiving pay.

#### *Examples include:*

- Booting up computers and logging in & out systems and programs.
- Completing paperwork or reports – usually before or after a shift.
- Reading company memos and updates.
- Travel time between multiple work locations in the same day.
- Attending meetings and required training programs.
- Working through lunch breaks.
- Putting on and taking off required protective gear before and after each shift or post-shift clean up.
- On the employer's premises waiting for and undergoing required exit searches of employee's bags and personal items (in California).





If your boss requires or permits employees to work off-the-clock or “shaves time” by decreasing employees’ actual work time, you and your coworkers could be missing out on significant regular and overtime wages. The first thing you should do is begin keeping your own accurate record of all time actually spent working. The next step should be to contact a lawyer who handles overtime pay and wage and hour cases to review your situation.

## 5. Your Bonus Was Not Included in Your Overtime Calculation

Everyone knows (or should know) that nonexempt employees must be paid at least time-and-one-half their “regular rate” of pay for all hours worked over 40 in a workweek. What everyone does not always know is what goes into the calculation of a worker’s “regular rate”. Many incorrectly assume that the regular rate is nothing more than an employee’s normal hourly rate – failing to realize that some other types of compensation, such as many types of bonuses, should be included. When this additional compensation is factored in, the employee’s overtime pay rate goes up, explaining some employer’s desire to overlook this issue.

The overtime law requires that a covered, non-exempt employee be paid time and a half their regular rate of pay for any hours worked over 40 per week. The regular rate of pay includes all forms of pay including non-discretionary bonuses. Employers often fail to include non-discretionary bonuses when determining overtime pay. When bonuses are included, the employee is entitled to receive a higher amount of overtime pay.

*If you believe that you have been denied overtime pay or would like to get more information, please call us at 1-866-559-0400, or submit your information using our convenient [Case Evaluation Form](#) for a **FREE and CONFIDENTIAL** review of your circumstances.*



A welder wearing a hard hat and protective gear is working in a factory. A large, bright spray of sparks is erupting from the welding point, illuminating the scene. The background shows industrial machinery and a blue-tinted environment. The text is overlaid on the lower left portion of the image.

# **Your Employer Failed to Pay You Overtime as a Day Rate Employee**

## 6. Your Employer Failed to Pay You Overtime as a Day Rate Employee

“Day rate” or “daily rate” employees are paid a flat amount for each day worked, regardless of the number of hours they put in during each day. However, employers are still required by law to pay most day rate employees overtime for all hours worked in a week over 40.

Many employers fail to pay day rate employees overtime pay as required by law. Many employers and employees think that an employee who is paid a day rate is not entitled to overtime pay. Merely paying a day rate does not exempt an employer from paying overtime pay. Day rate employees are entitled to overtime pay unless they are covered by a specific exemption.

### Employers Often Fail to Pay Overtime to Day Rate Employees

Many employers simply refuse to pay their day rate employees overtime at all. This occurs in conglomerates with thousands of employees, small businesses and all employers in between. A number of large energy and energy service companies have recently been sued for withholding overtime from their daily rate field service workers.

### Employers Misclassify Hourly Employees as Day Rate

- Many employers misclassify employees paid on this rate to take advantage of this difference in overtime pay. However, to qualify as a daily rate employee, the worker must actually receive a standard sum for each day worked. The worker’s day rate cannot change based in any part on the number of hours worked. Additionally, day rate employees may receive no other form of compensation for services from the employer. While certain payments that are not related to the number of hours worked (eg. gifts, expense reimbursements, bona fide profit sharing plan payments) are permitted and do not constitute “other compensation” for purposes of the day rate calculation, many common incentives that are in some way tied to the number of hours worked will invalidate the day rate plan.





## Employers Misclassify Day Rate Workers as Independent Contractors

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Further misclassification of day-rate workers occurs when employers attempt to label such workers as independent contractors (a/k/a 1099s) instead of employees. This is often done when such workers are provided through a third-party staffing company.

In this scenario, workers are treated as independent contractors and paid a flat amount for each day worked (the “day-rate”) without regard to the state or federal overtime laws that should apply. Given their job duties, day-rate pay, and the fact that such workers are in no way “running their own business” – they are properly classified as employees, not independent contractors, and legally entitled to receive at least time and a-half for each hour of overtime they work.

### 7. You’re Not Receiving Overtime Pay Because You Get Straight Time Pay.

Straight Time Pay is when employers pay an employee their regular rate of pay even when they are working overtime hours; when overtime pay should in fact be time and a half. Our firm routinely receives inquiries from workers who are just paid their regular rate of pay or “straight time” for the overtime hours they work. They want to know if this pay practice is legal or if they are being short-changed by their employer.

Unfortunately, it’s not at all uncommon for workers to be paid “straight time for overtime” these days. The problem presents itself in a wide array of industries, including: restaurants, oil and gas drilling, medical, CAD design, engineering, and



disaster response and recovery. The overwhelming majority of hourly workers who are being paid the same hourly rate for their overtime hours are being cheated out of their legally mandated overtime premium. This violation is almost always against overtime rules for hourly employees.





We have seen a recent wave of these straight-time for overtime claims involving:

- Workers who are treated as Independent Contractors, but are really employees.
- Workers who are employed through staffing companies and told they will be paid at straight time for all hours worked, instead of the time-and-a-half required under state and federal law.
- Management and technology hourly-paid consultants, analysts and business analysts.
- Construction workers
- Energy, Oilfield, Drilling and Petrochemical workers.
- Civil engineering workers
- Shipbuilding workers
- Disaster clean-up and remediation workers.



# You Missed the Overtime Claim Deadlines





## 8. You Missed the Overtime Claim Deadlines

Under federal law, which sets the time limits in most states, claims for unpaid overtime must be brought within 2 years. If the employer's violation of the wage payment laws is "willful", the time frame can be extended to 3 years. It is important to understand how the statute of limitations for unpaid overtime claims works – and differs from the limitations for other types of claims (such as personal injury) that you may be familiar with that allow an injured party to wait until the last minute to file a lawsuit but still preserve the full value of their claim.



Claims to recover unpaid overtime pay are subject to a look-back time period of limitations, meaning the time period for which unpaid wages can be recovered extends back from the day a lawsuit is filed (in most instances 2 or 3 years). So a lawsuit filed today would be able to seek recovery of back overtime for only the prior 2 or 3 years. Any part of a back wage claim that was earned more than 2 years (sometimes 3) before the date suit is filed may not be collectible.

If workers wait too long after they leave a job or after an unlawful pay scheme has been changed to pursue a claim, they may reach a point at which they begin to lose a portion of their claim with every day that passes. This means that any part of a back wage claim which was earned more than two years before a federal court lawsuit is filed may not be collectible. There are a few states that have overtime rules that provide an extended time period for recovering unpaid overtime wages, including the following:

California 4 years

Hawaii 6 years

New York 6 years

Kentucky 5 years

*While these longer limitations periods are beneficial to workers and give them more time to take action on claims provided under state laws, they do not extend the time limits for asserting claims under federal law. So, the best way to protect your rights is to act now to ensure that you do not miss out on any back pay that you may be entitled to recover.*

If you believe that you have been denied overtime pay or would like to get more information, please call us at 1-866-559-0400, or submit your information using our convenient [Case Evaluation Form](#) for a **FREE and CONFIDENTIAL** review of your circumstances.

# **You Are Being Unlawfully Charged for Certain Expenses**



## 9. You Are Being Unlawfully Charged for Certain Expenses

Neglecting to pay employees the proper compensation for all hours worked, including overtime, is not the only way employers can deprive workers of their proper compensation. A common tactic employers use to withhold an employee's earnings is to refuse to issue reimbursement for expenses paid by

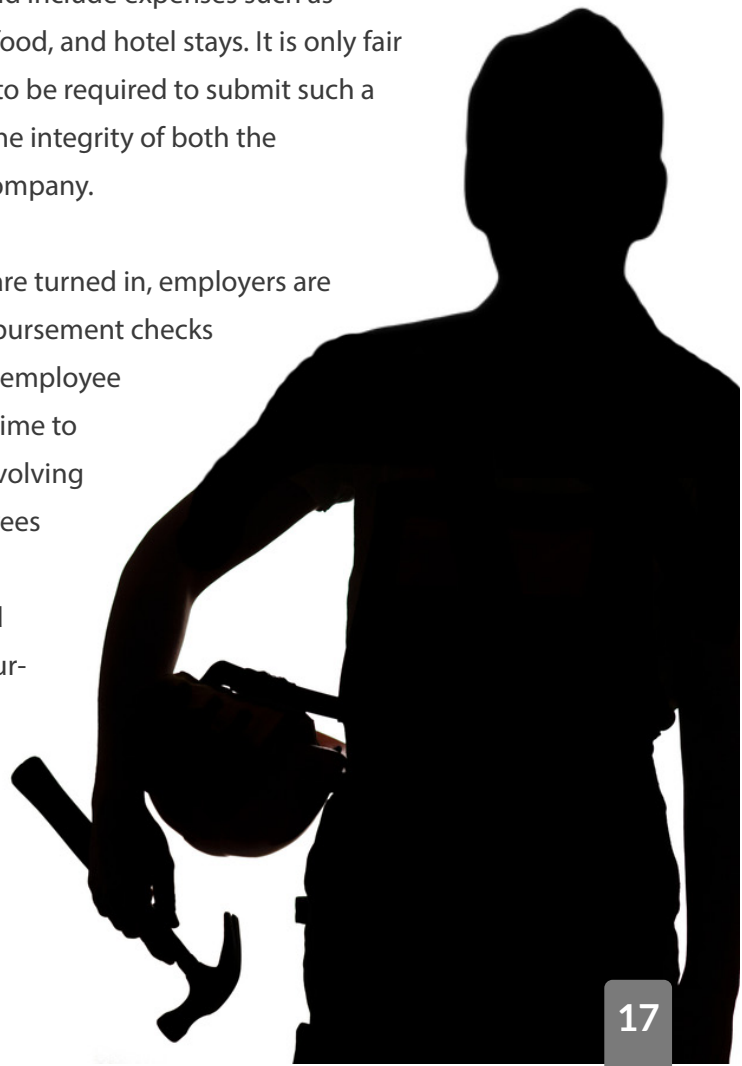
employees to fulfill required duties. It is important for employees to understand what qualifies as a work expense and what their employer should be reimbursing them for.

### The California Law States that Employers Must Reimburse Employees

California labor laws states that an employer must reimburse their employees for all expenses paid by the employee while performing their required duties. Typically an employee must submit an expense report to their supervisor itemizing their purchases and the total expenses for which the employee is to be reimbursed. For example, an expense report created after a business trip would include expenses such as transportation, food, and hotel stays. It is only fair for an employee to be required to submit such a report to protect the integrity of both the employee and the company.

After expense reports are turned in, employers are required to issue reimbursement checks

to those employees in a timely fashion. 30 days after the employee submits their reimbursement request is the typical wait time to receive a compensation check. A ruling from a lawsuit involving an employer neglecting to properly compensate employees for work expenses happened in the fall of 2007 in the California Supreme Court. The court decided that instead of an employer issuing a paycheck and a separate reimbursement check to an employee, they may reimburse an employee by increasing their pay, in substitution for an expense reimbursement, as long as it displays the amount the employee received for pay and the amount they received for reimbursement.





## **Failure to Compensate Workers for Expenses**

When employers fail to properly compensate workers for the business expenses they incur, the employees are entitled to recover their unreimbursed expenses, plus interest and penalties.

In some cases, employers place unreasonable (and often illegal) limitations on the employee's filing for reimbursement, however, an employer's internal rules are secondary to the statutes concerning California expense reimbursement claims.



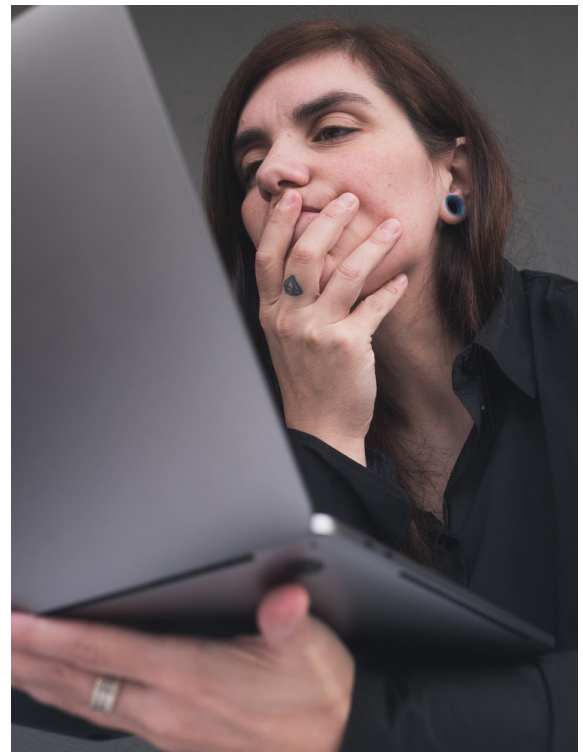
The purpose of California's business expense reimbursement law is to prevent employers from passing on their operating costs to their employees. Whether an expenditure is "necessary" will depend on the facts and circumstances, the nature of the employment, and whether the employer should have anticipated that an employee would need to make the expenditure. However, when an employee has been instructed to purchase something or to incur a specific expense (eg. cell phone and/or internet access to work from home), they will almost always be entitled to reimbursement for it.

## **10. You Are a Government Employee that is Misclassified as Exempt**

Most types of government employees are eligible for overtime under the Fair Labor standards Act (FLSA). However, even if you are eligible, your employing agency may fail to recognize your eligibility by misclassifying you as "exempt". When government employees are misclassified, they are deprived of full compensation for the important work they perform, including premium pay for overtime hours worked.

When this happens, you can get help from a government employee overtime attorney.

While you're considering whether to contact a lawyer, it may help you to understand all the factors that may play a role in your potential claim for backpay.



## How Does Federal Employee Overtime Pay Work

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- The requirements for federal employee overtime pay are covered by the Fair Labor Standards Act, and by Title V of the United States Code.
- Overtime Rules for Government Employees Covered by the FLSA.
- Under the FLSA, covered, non-exempt employees must receive overtime pay when they work more than 40 hours in one workweek.

This requirement is applied on a workweek basis. Each employee's workweek is defined as a fixed and recurring period of 168-hours (7 consecutive 24-hour periods). In most cases, the overtime pay earned in the workweek must be paid on the regular payday for that week's work hours.

The compensation rate for overtime pay is also set at not less than time-and-a-half of the employee's regular rate of pay.

Overtime Rules for Government Employees Covered by Title V.

FLSA-exempt employees who work full-time, part-time or intermittent duty may be eligible for overtime pay under Title V. These codes set rates that depend on the employee's basic pay rates.

Title V-covered employees are subject to a biweekly pay limitation that limits the amount of premium pay that they can collect. Their combined premium pay for that period cannot exceed the greater number of either the GS-15 pay rate or

the level V pay rate of the Executive Schedule. In most cases, FLSA-exempt employees will not receive the same protections that are enjoyed by FLSA-covered employees. For example:

- FLSA-eligible employees are entitled to pay for weekend travel if the travel occurs during administrative work hours. FLSA-exempt employees are not entitled to weekend travel pay in most situations.
- FLSA-eligible employees do not have a maximum earnings limitation, while Title V employees do.
- FLSA-eligible employees are not required to accept compensatory time off or credit hours as an alternative to overtime pay. Title V employees may be required to do so.





## Examples of Unique Conditions for Overtime

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Special overtime pay conditions or challenges may apply to government employees based on their role. The following sections will note some of the rules and exemptions that apply to common government employees:

- Firefighters & Rescue
- Law Enforcement

### Firefighters & Rescue

Overtime rules often apply to Firefighters in unusual ways due to the nature of their work. As first-responders, fire and rescue employees may be considered “on-duty” even when they are sleeping or eating meals.

When the employees work shift is expected to last more than 24 hours, the following rules may apply:

- Sleep: Employers may deduct 8 hours of sleep time from an employee’s worked hours, but only when that sleep time isn’t substantially interrupted. If work interrupts the sleep period so that fewer than 5 hours of sleep are used, the full 8-hour allowance must be paid.
- Meals: Employers may deduct meal times from worked hours, but only when the meal period is uninterrupted, and the employee is not required to perform any duties.

These rules may only apply when an agreement is in place between the employer and employee. Without an agreement, an employer may not be allowed to deduct any time that is spent on-duty.



## Police

Police are often obligated to perform certain types of pre and post-shift duties beyond their typical activities. These duties may include firearm maintenance, roll call, or briefings. Police must be paid for these duties. In most cases, they must be paid overtime if performing these duties requires them to exceed normal work hours.

Some police roles, such as dog handlers, require officers to perform their duties from home. The time spent caring for dogs at home, including their training, grooming, and feeding, must be compensated as worked time. It must be counted as overtime if performing those duties exceeds 40 hours in a week.

### Examples of Violations

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Government employee overtime violations can take many different forms. The following violations may be used to deprive government employees of overtime they've earned:

### Abuse of Exemptions

A government employer may abuse the definitions of FLSA exempt employees to declare that you are exempt from the overtime pay laws when you are not. This is referred to as "misclassification" and it can have a substantial impact on your overall compensation. The difference between getting paid time and one-half for overtime hours and not receiving such premium pay can be significant.

## Working Through Unpaid Meal Periods

Numerous claims have been brought by federal agency employees as the result of being pressured or induced to continue working during their off-the-clock meal periods. When employees are not able or allowed to take uninterrupted breaks where they are relieved of all duties, such time is compensable and they are entitled to additional overtime or comp time.

Such claims are common in healthcare settings.

### Averaging of Different Workweeks

Most non-exempt government employees are entitled to overtime pay every time the hours in a workweek exceeds 40. However, some employers may attempt to deny your overtime by averaging your worked hours in one week across multiple weeks.

For example, if you worked 48 hours in one week and then 30 the next, your employer might attempt to deny your overtime by recording that you work 39 hours both weeks. All of your hours would be accounted for, but you would no longer be eligible for overtime.

### Denial of Owed Wages

Your employer may not attempt to manipulate your hours. Instead, they may properly record your hours but refuse to compensate them as overtime.





## Next Steps: How to Claim Unpaid Overtime Pay

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### What can I do to protect my overtime rights?

You can file a complaint with the U.S. Department of Labor or hire an attorney to assist you and possibly file a private lawsuit. Private lawsuits are the way in which most employees recover unpaid overtime.



### What about retaliation for making a claim for overtime?

The FLSA is aimed at protecting the rights of employees and forbids an employer from retaliating against an employee who files an overtime claim or participates in a legal action to collect overtime pay. An employer who “willfully” retaliates can be subject to a claim for damages, fines, and even imprisonment.

### How do I prove the amount of time I worked?

It is the employer’s obligation to maintain accurate and complete records of the time worked by employees. If an employer does not maintain

proper records, the employee is entitled to recover based on good faith, reasonable and realistic estimates.

### If I am successful, what will I receive?

When plaintiffs prevail, they are entitled to recover all unpaid overtime for two or sometimes three years prior to the filing of a lawsuit. In almost all cases, they are additionally entitled to an award of “liquidated damages” equal to the amount of the unpaid overtime. This means that a successful employee can recover two times the amount of unpaid overtime.

A successful plaintiff can also be awarded attorney’s fees and expenses.

### What are the time limits?

In most cases, a Plaintiff can recover unpaid overtime for work done for two (2) years prior to a lawsuit being filed. In some instances, unpaid overtime can be recovered for work done for three (3) years prior to a lawsuit being filed. It is important to know that only the filing of a lawsuit “stops the clock.” Complaining to your employer or the Department of Labor does not “toll” the FLSA statute of limitations.





## How long does a case take?

While most cases settle prior to a trial, the process can take from several months to several years. There are many factors that impact the timing in an FLSA case, including where the case is filed, the amount of discovery and investigation required, the number of plaintiffs involved and the attitude of the parties.

## How do the lawyers get paid?

While there is no “standard” arrangement as to how overtime lawyers get paid, we handle overtime cases on a contingent fee basis. What this means is that our fees will be calculated as a percentage of any recovery or judgment we obtain for the client(s). We will advance all expenses relating to the case.

## Will I be taxed on my recovery?

Since you are recovering money that is owed to you for unpaid wages that would have been taxed had they been properly paid, the recovery will be taxed as income to you.

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