

Wage Theft Resources and Where To Go For Help

Wage theft has become rampant for many working-class individuals and students. Employers have taken advantage of the current economic conditions. High unemployment, deregulation and lack of enforcement efforts have led many employers to cheat their employees. In an effort to help abused employees, the Center for Working-Class Studies has developed a list of wage thefts and where employees might go to get some assistance from government agencies.

- **Not paying overtime** - Unless you are specifically classified as an "exempt" worker, your employer must pay you overtime wages for any hours you work over 40 hours in a workweek. The employer must pay overtime wages at a rate of at least one and one-half times (150%) your regular hourly rate. Your employer cannot change the overtime laws. Your employer cannot avoid paying overtime by enacting a no-overtime policy or by getting you to agree to a special deal. Your employer must pay you according to the law. Here are some common overtime violations.

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- **Improperly Calculated Overtime Pay** - Overtime rules are generally based on a single workweek. Non-exempt employees may be paid a number of ways: weekly, bi-weekly, or monthly. But, your employer must calculate overtime on the actual 40-hour workweek; the pay period does not matter. Employers cannot average hours over two or more weeks. Likewise, your employer cannot get you to agree not to follow the overtime rules.

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- **Comp Time Instead of Overtime Pay** - Compensatory time is paid time off generally granted to an hourly employee instead of overtime wages. This is often referred to as "comp time." For example, an employer must offer comp time to be taken later rather than paying overtime wages. Comp time can sometimes be legal, but the employer must pay it at 150%, the same rate as overtime wages.

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- **Employees Not Allowed to Report Work over 40 Hours Per Week** - Many employers have rules that no overtime work will be permitted or paid for unless authorized in advance. Some employers choose to ignore when hourly employees work

overtime or do not allow employees to report overtime hours. This violates the overtime rules.

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- **Misclassification of Employees as Exempt Workers** - Exempt employees are by law employees not entitled to receive overtime pay. Whether or not you are exempt can be confusing. However, it has nothing to do with your job title or job description, or whether you are paid a salary or hourly. What you actually do at your job on a daily basis determines whether or not you are legally entitled to overtime.

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- **Contract Employee Violations** - Contract employees or independent contractors include self-employed workers who are not covered by the tax and wage laws that apply to regular employees. Employers do not pay Social Security, Medicare, or federal unemployment insurance taxes on contract employees or independent contractors. Thus, employers are strongly motivated to classify workers into this category to save costs.

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- **Not paying minimum wage** - The Act requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage.

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- **Poor Record Keeping** - Every employer covered by the Fair Labor Standards Act (FLSA) must keep certain records for each [covered](http://www.dol.gov/elaws/esa/flsa/overtime/glossary.htm?wd=covered)(<http://www.dol.gov/elaws/esa/flsa/overtime/glossary.htm?wd=covered>), [nonexempt](http://www.dol.gov/elaws/esa/flsa/overtime/glossary.htm?wd=non_exempt)(http://www.dol.gov/elaws/esa/flsa/overtime/glossary.htm?wd=non_exempt) worker. Employers must keep records on wages, hours, and other information as set forth in the Department of Labor's regulations. Most of this data is the type that employers generally maintain in ordinary business practice.

There is no required form for the records. However, the records must include accurate information about the employee and data about the hours worked and the wages earned. The following is a listing of the basic payroll records that an employer must maintain:

- Employee's full name, as used for Social Security purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records
- Address, including zip code
- Birth date, if younger than 19
- Sex and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day and total hours worked each workweek
- Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

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- **Not Paying Wages** - Employers are legally obligated to pay their employees. Most businesses are affected by both state and federal (Fair Labor Standards Act or FLSA) laws regarding pay. These laws set the minimum wage, explain when employees must be paid, establish which employers must pay overtime and which employees are entitled to overtime, etc.

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- **Withholding Without Consent** - An employer cannot withhold a portion of an employee's wages without their consent, except for withholdings required by law (FICA taxes, for example)

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- **Withholding Pay as Punishment**- An employer cannot withhold pay as punishment - if an employee violates company policy and leaves on bad terms, they are still owed their full paycheck;

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- **Last Paycheck** - An employee's last paycheck is generally owed on or before the next regular pay day; even if overtime was unapproved, it still must be paid in most cases.

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- **Forcing Employees to Pay for Job-Related Equipment** - Under FLSA, an employer can charge employees for equipment that would, otherwise, be a company expense. If these expenses cause the employee's pay period earnings to drop below minimum wage, the employer, and not the employee, must pay for the equipment. Under OSHA's Personal Protective Equipment (PPE) guidelines, an employer cannot charge an employee for equipment needed to safely perform a job. An example of such equipment includes goggles, gloves and other protective clothing. The only exception to OSHA's PPE rule is when the damage is caused by the employee's negligence.

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- **Lost Work Time** - All time spent by an employee performing activities which are job-related is potentially "work time." This includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the employer). Potential work is actual work if the employer "suffered or permitted" the employee to do it. An employer suffers or permits work if it knows the employee is doing the work (or could have found out by looking), and lets the employee do it.

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- **Not Paying for Meals and Rest Period Pay** - Meal periods need not be counted as work time if they are at least 30 minutes long and the employee is relieved from active duties during the meal period. An employee who "works through lunch" is working and that time must be counted. An employee who "eats a sandwich at the desk," or is required to monitor a machine, is working through lunch. However, a meal period need not be counted as work time if the employee is merely expected to "remain available" during the meal period but is otherwise relieved of active work duties. So, for example, a meal period may be time not worked even if the employee is not permitted to leave the facility, or expected to remain in uniform.

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- **Not Paying for All Time Worked** - All time spent by an employee performing activities which are job-related is potentially "work time." This includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the employer). Potential work is actual work if the employer "suffered or permitted" the employee to do it. An employer suffers or permits work if it knows the employee is doing the work (or could have found out by looking), and lets the employee do it.

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- **Not Paying for Off the Clock Work** - Many FLSA lawsuits have involved employers failing to include time spent by employees performing work activities outside of their

normal shifts. Some employees, for example, may "come early" and start working before the official start time of their shifts. Such time counts as work time and must be included in FLSA pay computations, provided only that the employer knew or should have known that the employee was beginning work early (and, of course, to the extent that the employee spent pre-shift time actually performing work activities). Pre-shift "roll calls" are work time. Time spent setting up equipment before the official start time of a shift is work time. Some employees may similarly "stay late" after shifts performing work; this time must be counted as work time, as well. Time spent by an employee cleaning equipment after the close of a shift is work time. Post-shift work time could also include time spent by an employee performing job-related activities "on the way home," as for example a secretary who drops off the day's mail at the post office or delivers some paperwork to a customer or supplier. Some employees take work home. That time may well be work time. Similarly, if an employee is contacted at home by telephone for work related reasons, the time spent is work time (and, of course, if an employee is "called back" to work, the time counts as work time).

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- **Not Paying Training Time** - Most training time is work time. All training time is work time if it occurs during an employee's regular shift, or if it is required by the employer. Training time need not be counted as work time only if it (a) occurs outside of an employee's normal work schedule, (b) is truly voluntary (as in with neither direct nor indirect pressure on the employee to attend, and with no "come back" if the employee chooses not to attend), (c) not directly related to the employee's current job (i.e., the training is designed to qualify the employee to get a new job, and not to enhance the skills used by the employee on the existing job), and (d) the employee does no other work during the training.

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- **Not Paying Travel Time** - There are some "grey areas" about when the FLSA requires travel time to be treated as working time. However, as a general rule, "home to work" and "work to home" travel time is not work time, and this is true even if the "commute" is longer than normal, to or from a different work site than normal, or the employee uses a company vehicle for the trips. This assumes that the employee is performing no other work activities while commuting. Time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or airplane) to or from work. Travel time which is "all in a day's work" is work time. Usually, this means that travel time is work time if it occurs between when the employee first arrives at the first work site and before the employee leaves the last work site at the end of the work day. The first work site is the place where the employee first performs work activities.

For example, an employee who travels to the office, picks up equipment, then goes to a work site to perform the day's activities is working from the time s/he first arrives at the office. Picking up the equipment needed to do the day's activities is the first work activity of the day, and therefore the office is the first work site of the day.

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- **Not Paying for Sleep Time** - For employees who work shifts of 24 hours or more, the FLSA permits a "sleep time exclusion" of up to 8 hours, if there is an "agreement" with the employees about this and adequate sleeping facilities are provided. All time during which an employee is required to perform active duties must be counted as work time, and if in reality the sleep period is interrupted to the point where the employee does not have the opportunity for at least 5 hours of sleep the entire time must be counted as working time. No sleep time exclusion is permitted for employees whose shifts are less than 24 hours. Home work. As noted, "off premises" work time must be counted as work time. However, some employees routinely perform work activities off premises, at home and outside of their normal shift times. There may be peculiar practical difficulties in an employer's ability to control this kind of work. There is a special FLSA rule which permits employers and employees to agree to a predetermined amount of time which will be credited as work time under these circumstances. Essentially, this special rule permits the employer and employee to estimate a realistic average amount of off-premises time which is likely to be spent by the employee performing work activities on a "week in, week out" basis. The agreement must be "real," and not just imposed by the employer, and it must be set up before the work is performed. The amount of time must be estimated after consideration of "all pertinent facts."

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- **Only Paying 40 Hours** - The FLSA uses the work week as the standard for computing overtime pay due, and each work week stands alone. Thus, a nonexempt employee's time worked "vests" at the end of each work week (or work period). Work time may not be "averaged" from work week to work week. For example, an employee who works 44 hours in week one, followed by 36 hours in week two, is entitled to 4 hours of FLSA overtime pay for week one and may not be paid based on an "average" of 80 hours in the two week period. (Two exceptions to this might be for some medical care employees, and government police officers and fire fighters, who are permitted to be paid on special "alternative work periods.")

Similarly, time worked in one work week may not be offset against time off in some other work week (except for some government employees). An employer may not avoid paying FLSA overtime pay due in one work week by granting time off in another.

However, nothing in the FLSA guarantees any employee any particular amount of work time, or requires any particular schedule of work. An employer may "adjust schedules" within a work week to avoid an employee working FLSA overtime. For example, if nonexempt employees work "extra" time early in a work week, the FLSA permits the employer to "send them home" later in the same work week so that total hours actually worked in that work week will not exceed 40. This raises no FLSA issues, since "nothing happens" under the FLSA overtime rules until and unless total hours actually worked in a work week exceed 40. Stated another way, the only number that matters is the time worked as of the last minute of the last day of the work week (when work time "vests"). How an employer chooses to schedule an employee during the work week is simply not an FLSA concern, since that does not affect the pertinent FLSA computations.

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- **Not Paying Wages in Cash** - For non-government employees, FLSA wages due must be paid in money. "Compensatory time" off in lieu of cash for FLSA overtime wages due is not permitted in private sector employment. This rule is limited to wages for FLSA overtime work. How an employer chooses to compensate employees for hours worked up through 40 in a work week when no FLSA overtime is worked is not really an FLSA concern (except for the minimum wage laws). For example, assume a nonexempt employee is regularly scheduled to work 37.5 hours per work week, and actually works 40 hours in a work week. Since total time worked did not exceed 40 hours, the FLSA overtime rules have not been triggered. Therefore, there is no FLSA requirement about how hours 37.5-40 are paid (except for the minimum wage laws). An employer may compensate for these hours pretty much as it wishes, in wages at the regular rate, or some other rate, or in time off later, or for that matter with nothing extra at all (provided the minimum wage laws are adhered to).

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- **Not Paying Regular Rate** - FLSA overtime pay is time and one-half the employee's "regular rate" of pay. Therefore, to compute FLSA overtime pay due requires knowing what the regular rate is. In most cases, this is a straightforward inquiry, but in some situations the FLSA employs some peculiar arithmetic used to determine the regular rate.

The regular rate is defined as the hourly equivalent of all straight time compensation received by an employee for work. The FLSA formula is that an employee's regular rate is the total "straight time" compensation received by the employee "for work," divided by the number of hours that money is intended to compensate.

If an employee's straight time pay is a purely hourly wage, then that wage is the regular rate. However, in some employment situations, straight time pay is not simply an hourly rate. A nonexempt employee may be paid a "salary," and there may be additional compensation received by an employee which the FLSA requires be included as part of the regular rate.

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- **Salaried Nonexempt Employees** - The FLSA does not require that nonexempt employees be paid hourly. Nonexempt employees may be paid by means of a salary. Salaried nonexempt employees are still entitled to FLSA overtime pay if, when and to the extent that they actually work more than 40 hours in a work week. FLSA overtime pay is time and one-half of the employee's regular rates of pay. When a nonexempt employee is paid by a salary, the amount of the salary must be converted to its hourly equivalent to determine the regular rate of pay (time and one-half of which is the employee's FLSA overtime rate of pay).

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- **Including Out-of-Pocket Expenses in Regular Pay** - Payments to employees as reimbursements of out-of-pocket expenses are not required to be included in the regular rate, since they are not compensation "for work." For example, distinguish between educational "stipends" such as money paid to employees who have attained a specified degree, and "tuition assistance" programs in which the employer pays all or part of the costs of courses successfully completed by employees. The former is "compensation for work," includable in the regular rate. The latter is not, since it is a reimbursement for an expense. Extra money paid to employees to offset the cost of purchasing or dry cleaning work uniforms is not required to be included as part of the regular rate. Extra money paid to employees to compensate them for the time they may spend cleaning work uniforms is compensation for work and part of the regular rate. Mileage payments for the employee's use of a personally owned vehicle are reimbursements, not compensation for work.

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