

Wage and Hour Basics for Small Business

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Fisher
Phillips



Fisher Phillips

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A photograph of a barber with a beard and a brown hat, wearing a red shirt and a dark apron, cutting a customer's hair with scissors. The customer is a man with a beard, wearing a black barber cape, sitting in a black chair. The background shows a barbershop interior with shelves and a mirror.

1. Misclassification of Workers

- Businesses risk financially ruinous lawsuits or major penalties for misclassifying employees as independent contractors.
- Its imperative to get this right!

Misclassification of Workers

- **Common Mistakes:**

- Assuming a worker can simply agree to work as a contractor.
- Treating contractors the same as employees.
E.g., requiring contractors must attend staff meetings.
- Inconsistent treatment of workers.
E.g., directing contractors to take meal and rest breaks.
- Failure to comply with more demanding state laws.



Misclassification of Workers

- **IRS:** Right to Control Test

Weighs numerous factors, with ultimate question: Whether hiring entity exerts significant control over the worker?

- **DOL:** Economic Realities Test

Weighs six factors, with the ultimate question: Whether the worker is economically dependent on hiring entity?

- **State Level Tests:**

- Many states follow IRS or DOL standards; others apply a hybrid test.
- ABC Test: Some states have a more formulaic test that presumes the worker is an employee unless they meet specific criteria.
- Especially stringent rules in California and Massachusetts.



2. Failure to Keep Adequate Records or Provide Required Notices

Failure to Keep Adequate Records

- The burden is on the employer to prove that the company has: (A) appropriately paid for all hours worked for non-exempt employees, and; (B) paid the required minimum weekly salary for exempt employees.
- Retain employee records (under lock and key!) for term of employment plus five years.



Best Practice: Develop a formal document retention policy.

Failure to Provide Required Notices

- Employers must post “Employee Rights Under the Fair Labor Standards Act”
- Copies of the poster can be obtained from the DOL’s website at <http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>



A blurred background image showing a green combine harvester in a field. Several people are visible in the background, some standing and some near the machine. The scene appears to be a farm or agricultural setting.

3. Mistakes with Minimum Wage

- Minimum wage varies by state and locality.
- Federal minimum wage remains \$7.25 per hour.

Mistakes with Minimum Wage

- **Pay Attention to Changing Rules:**

Nearly half of the states will raise minimum wage during 2020. Its especially easy to make mistakes with changes to local minimum wage if you have a mobile workforce.

- **Unpaid Internships:**

Employers take a risk in working with unpaid interns. State rules vary; DOL provides specific guidance:

<https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships>



Mistakes with Minimum Wage

- **Tip Credit Rules**

Federal law permits a maximum tip-credit of \$5.12 per hour. State laws vary. *E.g.*, California prohibits tip-credits.

- **Underreporting and Deferring Hours:**

Cannot permit employees to underreport hours. Cannot defer payment on hours worked for any reason.

- **Time-Rounding:**

Time-rounding policies must be neutral. Violation if worker is consistently finishing tasks after clocking out.



4. Misclassification of Employees

- Employers must classify employees as either exempt or non-exempt from overtime rules.
- Misclassification is a costly mistake!



Misclassification of Employees

Exempt Employees:

- Paid regardless of quantity or quality of work
- No limit on the number of hours an employee may work or be required to work
- No overtime requirement

Non-Exempt Employees:

- Must be paid at least minimum wage for all time worked
- Employer must track and record hours to prove compliance
- Entitled to overtime after 40 hours in workweek or 8 hours in a day in some states.

Misclassification of Workers

To be classified as “exempt” from overtime rules, the employee must predominantly perform:

- Executive duties;
- Administrative duties;
- Professional duties;
- Outside Sales duties;
- Computer Related duties.



Misclassification of Workers

DOL's New Overtime Rule:

- Exempt employees must be paid \$684 per week (\$35,568 annually).

State Level Requirements:

- California requires a higher minimum salary; other states are contemplating raising salary requirements.





5. Mistakes in Calculating Overtime

Mistakes in Calculating Overtime

- Non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 hours in a 7-day workweek.
- Some states impose overtime requirements for non-exempt employees after eight hours worked in a single day.



Misclassification of Employees

- **Count All Time Worked:**

Include meal periods taken while working, breaks, travel, waiting-time where under your control.

- **Providing Comp Time:**

Employer cannot avoid overtime obligations by providing “comp” time to employees.

- **Lump Sum Payments:**

Lump sum premium payments do not satisfy overtime requirements.

- **Controlling Overtime:**

Employer can warn, suspend, and even terminate an employee who continues to work unauthorized overtime. But, you are required to pay for overtime, regardless of whether its authorized or not.



6. Employee Training, Travel and On-Call Time

Lectures, Meeting, Trainings Count as Hours Worked

Limited Exception:

- If attendance is voluntary;
- Outside normal working hours;
- Program is not directly related to the employee's job; and
- The employee does not perform any productive work during attendance.



Pay for Travel?

- **Home-to-Work** does not count as hours worked.
- **Travel Out of Town** for a special one-day assignment in another city is not ordinary home-to-work travel and counts as hours worked.
- **Overnight Trips:**
Time counts as hours worked when it cuts across the employee's workday; this applies to regular working days during normal working hours AND corresponding hours on nonworking days.

Pay for On-Call Time?

- Employees who reside on-site or are on-call for work are generally not considered to be "working" if they can use the time effectively for their own purposes.
- If they must be present at the employer's premises, the time must be compensated.



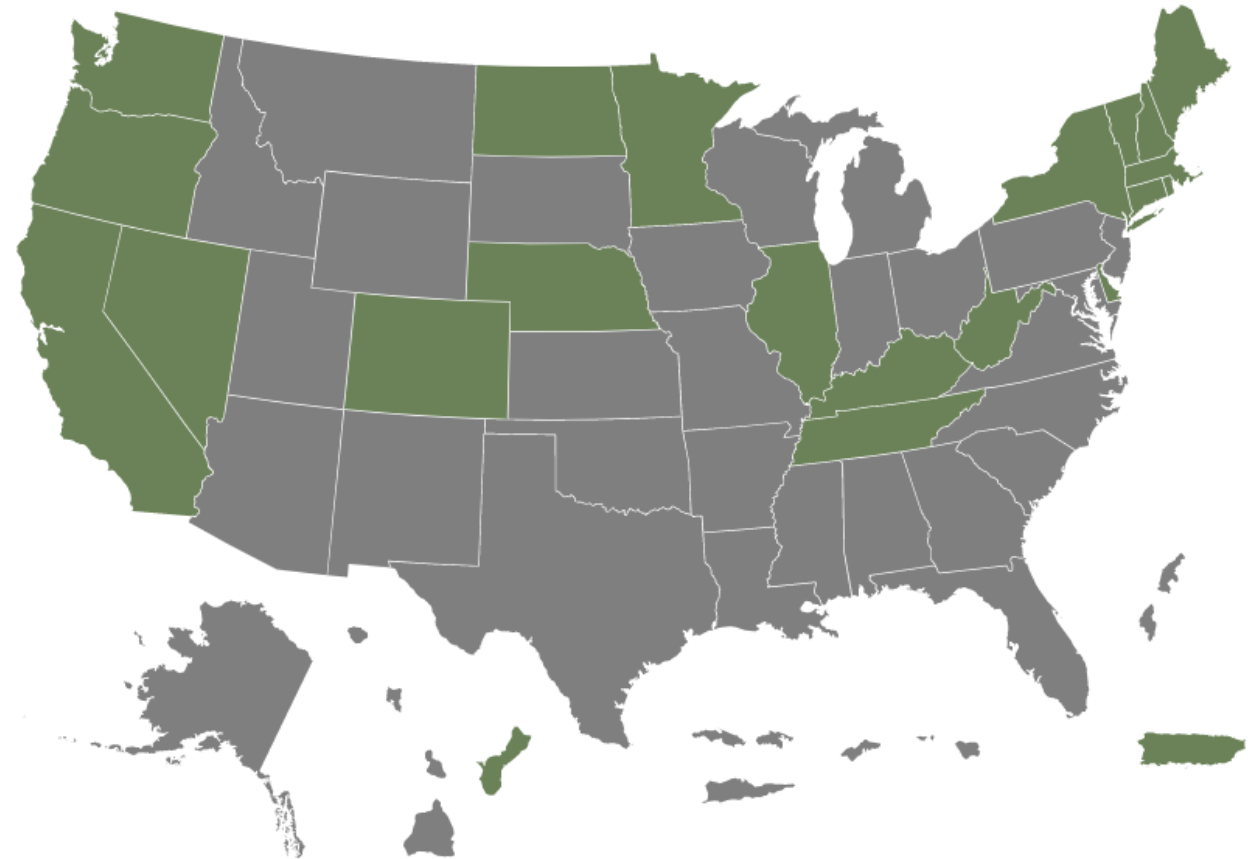
7. Mistakes with Meal & Rest-Breaks

- Federal law does not require meal or rest-breaks.
- But many states do.



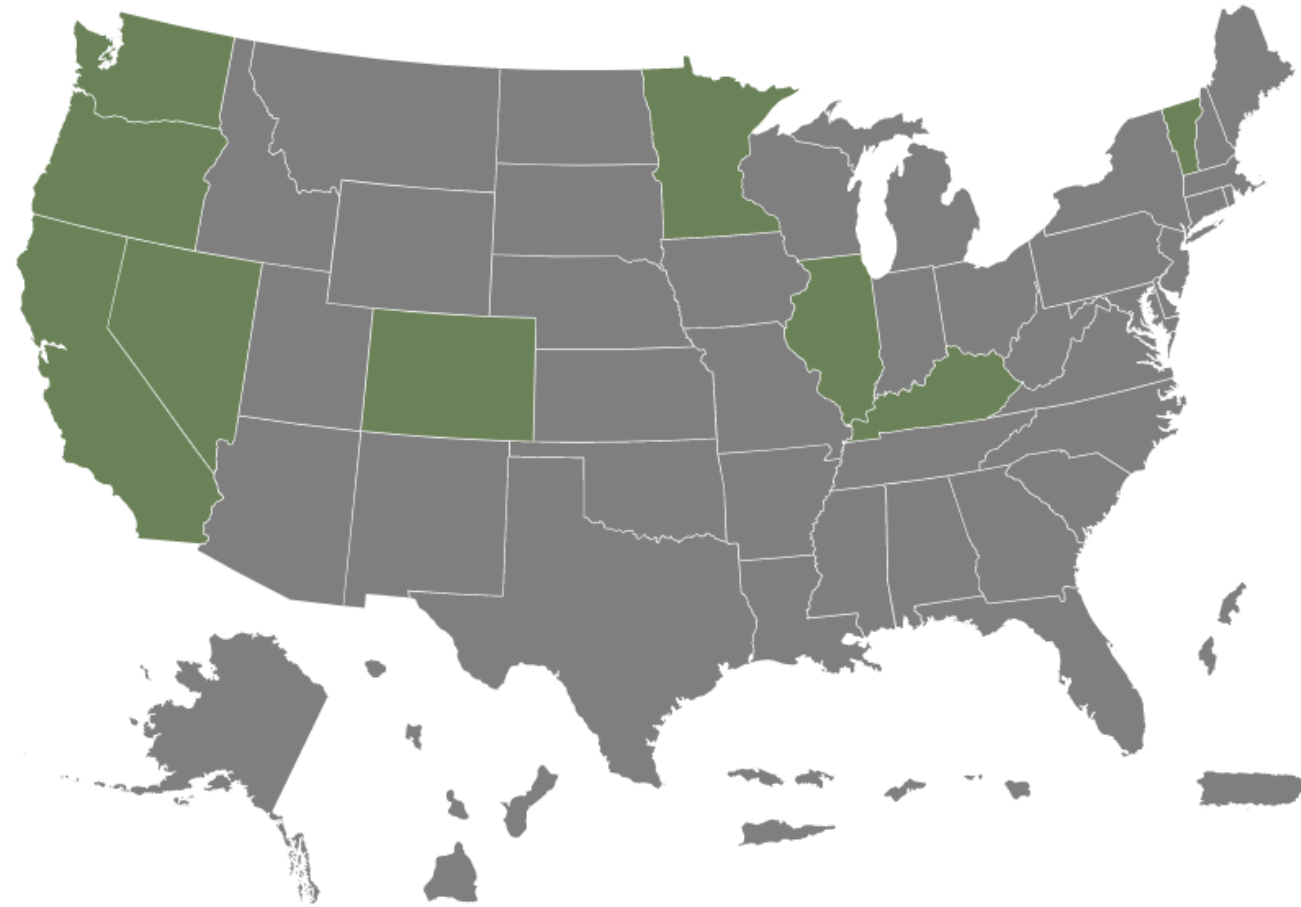
States Requiring Meal Periods

- State rules vary; however, those requiring a meal period generally require in the middle of the employee's shift.
- *E.g.*, California requires an uninterrupted (unpaid) 30 minute meal-period. Violations require one hour of extra pay.



States Requiring Rest-Breaks

- State rules vary; however, those requiring rest-breaks generally dictate breaks at specific intervals during the employee's shift.
- *E.g.*, California requires an uninterrupted (paid) ten-minute break in the middle of every four-hour shift, or major fraction thereof.



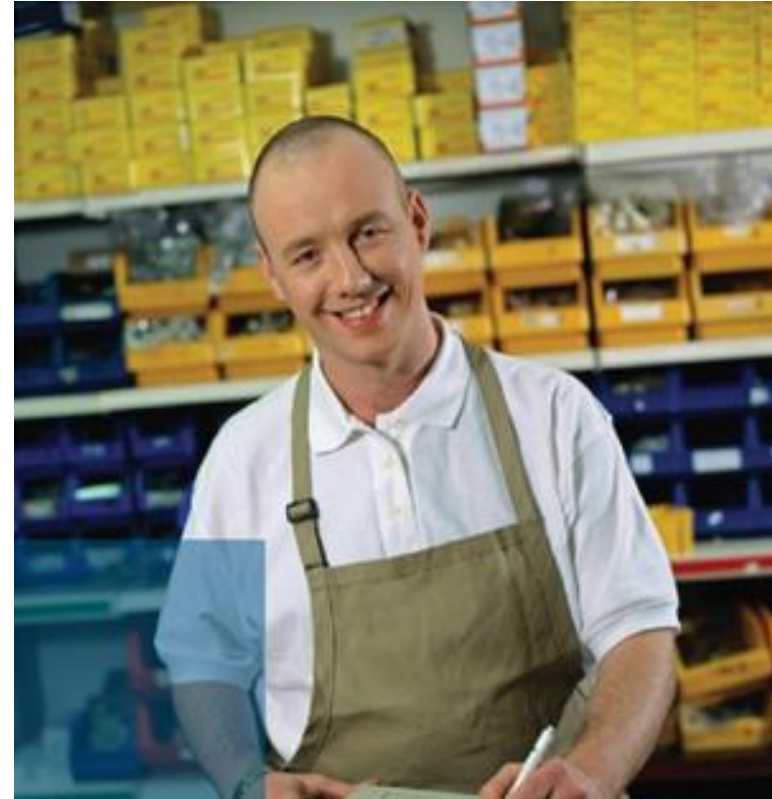


8. Reimbursement Policies and PTO Pay

- Federal law imposes few restrictions.
- State law may impose more demanding rules.

Reimbursement Requirements

- Federal law requires employers to ensure that the employee earns at least minimum wage when accounting for business expenses.
- Numerous states require reimbursement for business expenses, regardless of how much money the employee makes.



Note: Reimbursement for business expenses are not calculated as part of the employee's base-pay.

Vacation or Sick Pay?

- **PTO Generally Not Required:**

But numerous jurisdictions require paid sick leave time. Only Nevada (and soon Maine) requires paid personal time.

- **Written Policy:**

Most states allow employers to craft PTO policies as they like, as long as the employer complies with its own written policy.

- **Use It or Lose It:**

Some states prohibit “use it or lose it” policies. These states generally view accrued PTO as earned income.





9. Business Closures

Do I have to pay my employee when the office is closed due to bad weather? Or if we close early?

Business Closures

- **Closures Due to Inclement Weather:**

Exempt employees must be paid usual salary; however, a written policy might require use of PTO.

Non-exempt employees are paid on an hourly basis for work performed; so there is generally no obligation to pay non-exempt employees for missed work.

- **Employee Cannot Make It:**

If the business remains open, non-exempt employees are not paid. Exempt employees must be paid if they perform *any* work that day.



Office Closures

- **Early Closures Due to Lack of Work:**

Some states require reporting time pay for employees who show up for work if they are sent home early. *E.g.*, Waitress is asked to go home after working only 30 minutes because it's a very slow day.

Reporting rules vary by state. *E.g.*, California requires pay for half the employee's scheduled shift (up to four hours), or at least two hours of pay.



10. Paycheck Deductions

Careful with Paycheck Deductions

- **Permissible Deductions:**

Taxes; Social Security; Medicare;
Insurance Premiums; 401K Contributions.

Generally employees must provide written authorization for non-tax related deductions, which must not reduce the employee's wage rate or overtime pay below the statutory minimum wage requirements.

- **Exercise Extreme Caution:**

State law often prohibits other deductions. *E.g.*, deductions for breaking equipment.





Catch Wage & Hour
Mistakes Proactively

Work with trusted counsel to identify and resolve wage & hour problems.



Thank you!

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