

## **Wal-mart Owes Millions to Employees Cheated of Overtime Pay**

Wal-Mart is known for its low prices, but the company's most recent headlines highlight its low wages. The retail giant has agreed to pay its current and former employees nearly \$4.83 million in unpaid overtime following an investigation by the U.S. Department of Labor's Wage and Hour Division. Wal-Mart also agreed to pay \$463,815 in penalties for its error, which involved the misclassification of some employees as exempt from the overtime pay guarantees of the Fair Labor Standards Act (FLSA).

The FLSA states that covered, nonexempt employees are entitled to overtime pay at a rate of not less than one and one-half times their rate of regular pay. Overtime pay is due for every hour worked over 40 hours in a seven-day workweek. Certain job functions may make an employee exempt from this FLSA protection, however.

Until 2007, Wal-Mart classified its vision center managers and asset protection coordinators as exempt from overtime pay requirements. The company corrected the classification for these employees that year following the Department of Labor investigation, and the resulting dispute over back wages and penalties has only now been resolved.

"Misclassification of employees as exempt from FLSA coverage is a costly problem with adverse consequences for employees and corporations," said Secretary of Labor Hilda L. Solis, according to a Department of Labor news release. "Let this be a signal to other companies that when violations are found, the Labor Department will take appropriate action to ensure that workers receive the wages they have earned."

### **Are You Covered or Not?**

More than 130 million U.S. workers are covered by the FLSA, which establishes standards for minimum wage, record-keeping and youth employment in addition to overtime pay. Whether or not an employee is covered depends on the type of employer and the employee's specific duties.

All employees are covered within organizations that earn at least \$500,000 in annual gross sales or engage in interstate commerce. Employees of hospitals, public agencies and most schools are also covered.

Executives, administrative workers, outside sales agents, certain professionals and some computer workers are exempt from the minimum wage and overtime pay standards. In each of these employment categories, the Department of Labor has established several tests that must be met in order for an employee to be considered exempt. In Wal-Mart's case, the Department of Labor disagreed with Wal-Mart's assertion that its vision center and asset protection employees passed these exemption tests.

"It's amazing how many companies — big employers, small employers — are running afoul of the Fair Labor Standards Act," said Graig F. Zappia

, an employment law attorney with Tully Rinckey. “But violations can happen particularly easily when you’re dealing with large employers like Wal-Mart. There are not only so many employees but also so many job functions, and this can increase the odds that the employer will interpret the FLSA incorrectly.”

## **Repeat Offender**

The six-figure civil penalty leveled against Wal-Mart is due to the “repeat nature of the violations”, according to the Department of Labor news release. One of Wal-Mart’s past FLSA violations was settled in 2007 and also involved overtime pay. The company paid \$33.5 million plus interest to more than 86,000 workers for unpaid or underpaid overtime.

Wal-Mart’s overtime underpayment relates to another rule dictating how overtime pay should be calculated. Overtime workers are entitled to one and one half times their “regular rate”, which may actually be higher than their basic hourly rate. This is because the “regular rate” includes any bonuses, geographical differentials and other incentives earned in addition to the hourly rate. By failing to include these additional sums in their calculations, Wal-Mart short-changed even those employees who were correctly classified as eligible for overtime.

Though FLSA lawsuits typically originate with employees who discover they’ve been underpaid or otherwise mistreated, the Department of Labor may also take legal action on its own when dealing with repeat offenders.

“Once you’re on the government’s radar for previous violations, you may find yourself receiving random audits,” said Zappia.

## **Common Violations**

FLSA violations don’t begin and end with misclassified employees and miscalculated overtime pay. It’s also not uncommon for employers to allow or require employees to perform duties off the clock. Employees who are forced to set up before clocking in, clean up after clocking out or work through unpaid breaks are legally entitled to compensation.

“People often think they’re doing the right thing for their employers by working late off the clock or working through their lunch hour,” said Zappia. “But the reality is that you need to be paid for all the hours you work. We even see companies in this economy saying, ‘We won’t pay you overtime, but we’ll give you comp time instead.’ But that’s not really a valid solution.”

Comp time, or paid time off, is sometimes offered as an overtime pay alternative to employees who have busy weeks and slow weeks. By working longer hours during peak times, these employees can theoretically earn extra days off to spend during the slow periods. But this is illegal under the FLSA for two reasons. First, the FLSA requires that overtime be paid in cash, and second, workers in this arrangement often earn only one hour of comp time for every hour of overtime, rather than one and one-half hours.

Workers who suspect their employers of violating their rights under the FLSA should contact an employment law attorney

to consult on their situation.

“We’ll often meet clients who believe they were wrongfully terminated, and once we get down to the crux of the matter, we’ll discover they were salaried when they really should have been classified as hourly employees with potential for overtime pay,” said Zappia. “A lot of people don’t know enough about the act to understand when these types of violations are taking place.”