



# An old law still has teeth

With the raise in minimum wage and confusing rules for overtime pay, make

sure the FLSA doesn't bite your business

**N**ow that the Democrats will control Congress, businesses can be sure of one thing—a bill will be introduced to raise the minimum wage. The federal minimum wage is part of the *Fair Labor Standards Act of 1938*, which also establishes standards for overtime, child labor and recordkeeping.

The current minimum wage is \$5.15 per hour and it has not gone up since the 1996 FLSA amendments raised it from \$4.25 to \$5.15. Right now, the conventional wisdom is that the minimum will go up to \$7.25, probably by increments over two or three years.

By Brian Farrington

## FLSA and the minimum wage increase

Whether and to what extent a minimum wage increase will affect your rent-to-own business depends on many factors. For one thing, a lot of states have already raised their own minimum rates above the federal level. If you're in one of those states, an increase in the minimum wage will have little or no effect; in fact, you may already have to pay \$7.25 or more in some states. In other states where there is either no state minimum or where the state minimum is the same as the federal, you may find that the "floor" under wages is going up.

Another important factor, of course, is how much you currently pay. If you pay at or near the minimum, you'd better budget for an increase in labor costs. If you are paying your employees, say, \$10 per hour or more, the minimum wage increase won't matter. For employers who pay in the \$7.25-to-\$9-per-hour range, an increase might have no direct effect, but could put pressure on you to give your employees a raise anyway. After all, no employee wants to think of himself or herself as a minimum wage employee and they would like to see some distance between their rate and the minimum.

## FLSA and correct overtime payment

The minimum wage is not, however, the most important aspect of the FLSA in the rent-to-own business, or in any other enterprise. What makes the FLSA important is overtime. Unless an exemption applies, employees subject to the Act are required to receive time and a half of their regular rate of pay for hours worked more than 40 in a week. The Wage and Hour Division of the U.S. Department of Labor enforces this law. Rent-to-own employers are frequently investigated, often resulting in substantial back-wage liability for unpaid overtime or minimum wages. Moreover, private lawsuits for unpaid overtime have become among the most common lawsuits filed against employers. For large multi-store operations, liability can be in the millions. Let's look at the basic overtime rules as they apply to a typical rent-to-own store.

**EMPLOYERS MUST DESIGNATE A WORK WEEK:** The work week is a fixed and recurring period of seven consecutive 24-hour days. It begins whenever the employer chooses and ends 168 hours later. You can select any work week you want—Monday through Sunday, Wednesday through Tuesday, etc.—but once you have selected a work week you must abide by it. It can only be changed if the change is intended to be permanent.

**ACCURATE RECORDS:** FLSA compliance begins with recordkeeping. Employers are required to keep an accurate record of the hours worked each day and each work week by their employees. One of the most damaging lawsuits

you can have is one accusing you of working employees "off the clock." RTO stores are particularly vulnerable because their employees are often away from the store making deliveries, picking up merchandise or collecting. You must ensure that every hour your employees worked is recorded and paid for.

**OVERTIME APPLIES TO ALL EARNINGS, INCLUDING BONUSES AND COMMISSIONS:** Another common mistake is payment of overtime only on base rate, not on total earnings. Let's say an employer pays \$8 per hour, plus various leasing bonuses, etc. In a typical workweek, the employee works 50 hours and earns \$100 in extras. The employer pays as follows:

40 hours x \$8 = \$320  
10 overtime hours x \$12 = \$120  
Extras: \$150  
Total: \$590

Another way of expressing overtime, and probably a better way, is to show all hours worked, including overtime hours, at the straight time rate, which is \$8 in this example, and show only the additional half-time premium, which would be half of \$8, or \$4, for the overtime hours:

50 total hours x \$8 = \$400  
10 overtime hours x \$4 = \$40  
Extras: \$150  
Total: \$590

But this employer is in violation of the FLSA. Why? Because the overtime was paid only on the base rate of \$8, not on the extras. The extras are part of the employee's earnings, too, and are subject to overtime. So the proper calculation is to add up all the straight time earnings, divide by hours worked to find the average hourly rate, which the law calls the "regular rate", divide the average hourly rate by two to get the half-time premium and then multiply the half-time premium by the number of overtime hours to get the amount of overtime due:

$[(50 \times \$8) + \$150] \div 50 = \$550 \div 50 = \$11$ ;  
 $\$11 \div 2 = \$5.50$ ;  $\$5.50 \times 10 = \$55$

So the overtime due is \$55. The entire payment to the employee then looks like this:

50 total hours x \$8 = \$400  
Extras: \$150  
Overtime: \$55  
Total: \$605

Notice that when overtime is paid only on the base rate, the employee's total compensation was \$590. When overtime is paid on all earnings, the employee's total compensation is \$605. The extra \$15 is the overtime due on the extras and employers who do not pay overtime on all compensation are in violation of the FLSA and have at least a two-year back-wage liability. (Note: there are a few regular rate exclusions, meaning that there are some payments upon which the employer need not pay overtime. These include modest Christmas bonuses, discretionary bonuses, fringe benefit payments to third parties such as insurance companies and a few more.)

**NO "COMP TIME" FOR OVERTIME:** Even if they want it, employees can't be paid for overtime in compensatory time off. If they work more than 40 hours in a work week, overtime is due in money on the next regular paycheck for the pay period in which the overtime is worked.

**NO AVERAGING OF WORK WEEKS:** Each work week stands alone for overtime purposes. If an employee paid every two weeks worked 48 hours the first week and 32 the next for a total of 80 and an "average" of 40, the employee is still due eight hours of overtime from the first work week.

**ONLY THE STORE MANAGER IS SALARIED EXEMPT:** The most common of all FLSA mistakes in the RTO industry is treating too many employees as "salaried" with no overtime. There actually is an exemption from the overtime requirement for bona fide executive, administrative and professional employees, as well as outside salespeople, and most employees must be salaried to be exempt. However, in addition to the salary requirement, there are also complex "duties" tests that employees must meet to be exempt. The subject is too lengthy to examine in depth here, but the bottom line is this: in the vast majority of cases, any store with fewer than eight to 10 employees cannot have more than one salaried exempt employee, and that's the store manager. Everyone else should be paid overtime.

(Note: there is another, completely unrelated exemption from overtime for any employee paid primarily by commission in a retail store who is able to average for all hours worked more than one-and-a-half times the minimum wage. This exemption, called the "7(i)" exemption or the "commission sales" exemption, can be applicable to RTO stores that are willing to put their employees on commission and structure their pay systems carefully to comply with all the requirements of the law.)

The FLSA may be old—2007 will be its 69th year—but everyday employers who disregard its requirements pay back wages and attorney fees. Let the attention that will be paid to the Act because of proposed increases in the minimum wage be the occasion for all RTO employers to review their FLSA compliance status and fix what's broken. ■

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