

Even Least Productive Workers Must Earn Minimum Wage

Question:

Our company employs people to sell products on a door-to-door basis. These products might include books, household products and personal beauty items. Occasionally, we also contract with organizations to collect signatures for various initiatives on the Oregon election ballot.

As is usually the case, I have my star performers and my slowpokes. Some people whisk around each neighborhood charming people, moving quickly and producing sales like crazy. Since I pay by piece-rate, they are naturally the people who earn the most money.

The slower people, of course, earn less – there are some weeks where they don't even make the minimum wage. And to my mind, that's how it should be: The better workers get more and the worse ones get less.

But recently, one of my slower employees has threatened to file a lawsuit for minimum wage and overtime. He says he's been keeping records, and will prove I have underpaid him.

I myself have never kept records, because I pay piece-rate and I thought I didn't have to worry about those requirements. It just doesn't seem right to me that the slowest worker might end up getting more out of this claim than the better workers who don't rely on lawsuits to earn a decent living! Regardless of my personal views, I want to follow the law. Is there a chance I might owe some money here?

Answer:

It depends on the nature of work performed by your employees. "Outside sales persons" are exempt from minimum wage and overtime under both state and federal wage and hour laws. Signature gatherers, and persons engaged in making sales by telephone or at their employer's place of business are not exempt "outside sales persons," however, and you are required to keep track of the hours worked by these employees and make sure they are paid no less than the minimum wage for all hours worked and overtime for weeks in which they work more than 40 hours. Although it is permissible to pay employees on a piece-rate basis (by the item sold), you must ensure that non-exempt employees receive at least the equivalent of the minimum wage for all hours worked (and overtime). In addition, don't forget that Oregon law now requires that signature-gatherers be paid by the hour, not by the signature.

It also doesn't matter if your employees understood and agreed to be paid a potentially lower wage. Employees may not sign away their legal rights under federal and state employment laws.

For example, let's say a non-exempt employee engaged in making telephone sales, who is paid on a piece rate basis, worked 50 hours in the week but only sold enough to earn \$100.. Your policy may be very clear about what he's earned, but because the minimum wage is now \$7.50 an hour, you are going to have to supplement his wages so that he earns a total of at least \$375.00 (50 hours X \$7.50).

In addition, since he worked 50 hours in that work week, that means that you also owe him for 10 hours of overtime. The overtime rate can be calculated very easily by dividing the amount already earned in the workweek (\$375.00) by the hours worked (50). You'll come up with a total of \$7.50 (interesting coincidence), which is called the "regular rate."

Next, you must figure out the "half-time rate," the extra you will need to pay for all hours over 40. You do that by dividing the regular rate by two. In this case, you'll get \$3.75.

Now all you need to do is multiply all the overtime hours (10) by that half-time rate (\$3.75) and you'll come up with overtime of \$37.50. Add that to the original \$375.00 and you get \$412.50; the amount you must pay him for that workweek.

You've mentioned that you didn't keep records because you didn't think it was required. Again, the requirement to keep records of the hours worked by your employees depends on the type of work performed and whether or not the employees are exempt from the minimum wage and overtime provisions of the law. Although you are not required to keep track of the hours worked by your employees during weeks in which they are engaged in exempt work (making outside sales), you are required to track their time during workweeks in which they are not engaged in making outside sales; for example, when they are engaged in gathering signatures for petitions. As you can see, it is possible for an employee to be "exempt" one week and not exempt the following week, depending on the nature of work performed.

Employers are required to keep detailed wage records for their non-exempt employees, and to retain them for two (in some cases three) years. For non-exempt employees, these records must include (among other things) the rate at which the employee was paid, the hours the employee worked, any deductions and the purpose thereof, and any overtime earned.

For information on this and other employment laws impacting Oregon employers, visit our website at www.Oregon.gov/boli/ta.