

# The Most Common FLSA Pitfalls and How to Avoid Them

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Fair Labor Standards Act ("FLSA") claims are common in the hospitality industry and can result in significant financial damage. It is imperative that employers are proactive and review their timekeeping policies with legal counsel. Employers should strive to maintain accurate time records, conduct thorough audits, train employees on timekeeping procedures, and discipline uniformly for timekeeping violations. Below are six of the most common FLSA-related pitfalls for employers to avoid.

**Pitfall #1:** "If I direct the supervisors in my company to instruct all employees not to enter more than forty hours a week on their timesheets, any additional hours that the employees choose to work that are 'off the clock' are not compensable."

**Reality:** When artificially low time reporting is encouraged and supervisors know that employees are working unpaid overtime, knowledge and liability may be imputed to the employer. If an employer knew or had reason to know that its employees underreported their hours, the employer cannot escape FLSA liability by asserting defenses based on that underreporting.

**Pitfall #2:** "If an employee claims he or she is entitled to overtime hours, but our company does not keep the 'best' of time records, the employee will not be able to prove entitlement to overtime."

**Reality:** The overtime provision of the FLSA does not require an employee to keep records of his or her hours of employment and if an employer fails to maintain employment records, an employee's testimony as to the amount of overtime is appropriate.

**Pitfall #3:** "If I classify an employee's official title as an 'executive' or 'outside sales employee,' then I do not need to pay them overtime."

**Reality:** The Wage and Hour Division has explained that each situation will be analyzed on a case by case basis. Merely because an employee is "classified" as "exempt" does not control whether the exemption is proper.

**Pitfall #4:** "If an employee brings a wage and hour claim against my business, I can assert a counterclaim against that employee for all of the employee's violations to offset any amount I might owe to the employee."

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Reality: Many federal courts do not allow for counterclaims in FLSA lawsuits and instead require an employer seeking relief against an employee to file a separate lawsuit altogether against the employee.

Pitfall #5: "If an employee brings a wage and hour claim against me, the most financial damage the lawsuit will cause is it will force me to pay the employee the overtime wages I might have had to pay in the first place."

Reality: FLSA lawsuits can be quite costly. First, a successful employee can recover his or her unpaid wages. Second, a successful employee can recover his or her attorneys' fees and costs. Third, unless an employer has a reasonable good faith defense, a successful plaintiff can recover liquidated damages, up to an amount equal to the unpaid wages. That means that if an employer owes \$10,000 in unpaid wages and the court finds that the employer lacks a reasonable good faith defense, the court can impose liquidated damages of up to an additional \$10,000, doubling the employer's amount owed to the employee. Fourth, the United States Attorney General is authorized to enforce criminal penalties for willful violations of the FLSA, which include a \$10,000 maximum fine and a six-month maximum imprisonment term.

Pitfall #6: "I am off the hook if the company gets hit with a wage and hour claim because I am just a manager."

Reality: A manager or corporate officer who actively participates in running a company's business may be an "employer" who could be jointly and severally liable for unpaid wages along with the company. The FLSA broadly defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."

### About Deedee Bitran

[Alamea Deedee Bitran](#) is an attorney in the Fort Lauderdale office of Shutts & Bowen, where she is a member of the Business Litigation Practice Group. Deedee represents employers, business owners and developers.

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