

Common Situations:

Vacation and Overtime: An employee takes two vacation days during the week, but upon return has so much to do that the employee manages to log 40 hours of true work in the remaining 3 days. You do not have to treat the vacation as 16 hours worked and pay overtime, the law only considers hours truly worked.

Breaks: Employees at Acme Brick are required to take a 10 minute break twice a day and that time is deducted from their pay. Interestingly enough, any break less than 20 minutes is considered beneficial to both the employer and employee and is counted as “work” time. Note, however, that employers are not required to give any breaks for smoking, lunch, or any other purpose (except nursing mothers and possibly by local ordinance, e.g. Austin, Texas requires a 10 minute break per 4 hours for construction workers).

Holiday Pay: Employees at Bah Humbug, Inc. are required to work on holidays and paid straight time. No problem. Employers are not required to give days off or pay even standard overtime for holidays.

Salary and Fluctuating Hours: Joe works 43 hours one week and 37 for the next two week before going over 40 again. Joe receives his standard salary even though he does not work 40 hours in some weeks, plus, his employer must pay overtime for the weeks over 40. If Joes schedule has enough regular fluctuation, he and his

employer can make an agreement (preferably in writing) for “Chinese Overtime”, by which Joe earns just the ½ overtime premium for overtime hours.

Semi-Secret Overtime: Beth’s shift ends each day at 5:00, but she routinely leaves the office at 5:25. You don’t pay close attention to what she does during that time but you have reason to believe she works. If you know or have reason to believe an employee is working overtime – even if they don’t report it – you must investigate and pay any overtime due.

What Should I do:

Good: Be careful to calculate overtime correctly. Keep employee time records three years. Make employees clock in and out for lunch. And, don’t forget the most common mistake: salary employees aren’t necessarily exempt from overtime!

Better: If you have salaried employees that earn overtime, but have regular fluctuation between weeks over and under 40, make an agreement to pay “Chinese Overtime”.

Best: In addition to the above, have employees acknowledge to any travel policies you may have. Require all employees to report any other employee they observe working but not reporting overtime. Finally, have employees sign off each week that their hours are correct.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**