



**FULFILLING OUR PROMISES**  
TO THE MEN AND WOMEN WHO SERVED

# NONPROFIT ADVISOR

For DAV Departments and Chapters

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## **DON'T WAGER ON WAGES!**

### Pitfalls in Paying/ Not Paying Employees

Just recently, a DAV chapter was served with a demand from a state Wage and Hour Board concerning a failure to pay wages to an occasional employee in its bar and lounge. We don't know whether the employee or the chapter had the better argument, but the amount of the claim is interesting – less than \$100. Imagine the time and expense to respond to a matter involving such a small sum of money!

Wages are sacred, and they should be. Even the Bible incorporates the concept of an honest day's pay for an honest day's work, and the law has certainly adopted that mantra. State and federal law prescribe penalties, sometimes severe ones, for employers that monkey around with wage payment requirements. This issue of the newsletter identifies some common pitfalls.

#### **FREQUENCY OF PAYMENT**

Most states require employees to be paid at least twice a month. Some states extend the requirement to once-a-month payment. Departments and chapters should consult their state labor departments to confirm the requirement in the state. **BIG RISK:** Paying wages monthly when state law actually mandates bi-monthly.

The frequency-of-pay rules are sometimes inapplicable in cases where an employee is fired. Although the majority of states permit the final pay to occur on the next regular payday, some jurisdictions require the

employer to provide final wages more quickly, even on the day of firing. **BEST PRACTICE:** Plan any terminations carefully in advance and have the final paycheck ready at the time of notice.

#### **PAYMENT OF OVERTIME**

Federal law provides that most workers must be paid time-and-a-half for excess hours worked in a given week. "Excess" hours means anything over forty hours. These overtime rules apply to so-called "non-exempt" employees. "Exempt" employees are generally higher salaried, skilled workers. These need not be paid overtime.

The determination of whether an employee is "exempt" is a judgment that is made strictly on the basis of standards set out in the Fair Labor Standards Act. It is a legal determination. An employee cannot waive his/her right to overtime by agreement. In the same way, the fact that an employee's compensation is expressed as a salary (i.e., \$35,000 a year) is irrelevant to the determination of eligibility for overtime. Some states require that an employee be paid overtime for any hours worked in excess of 10 in a single day.

The misclassification of employees as "exempt" or "non-exempt" is one of the *biggest risks* in the wage payment area. (**See** the Winter 2013 issue of this publication for more details.) An employer could wind



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up being liable for up to three years of unpaid overtime! If the employer has not kept records of the employee's hours of work, the employee's estimate will generally be accepted as valid. **BEST PRACTICE:** Classify employees as "non-exempt" unless you have good advice to the contrary. Monitor and record employee work hours and pay all overtime due.

It is acceptable for an employer to forbid employees to work overtime, but there should be a mechanism in place for an employer to detect excess hours worked. Ignorance on the employer's part of the time that an employee is working is generally NOT grounds to avoid the payment of overtime. Example: ABC Company has a strict policy, communicated to all employees, against working overtime. Jones has been coming in and working two hours early every day for a year. At the end of the year, Jones makes a claim for 500 hours of pay at time-and-a-half. Questions: (1) Does ABC owe the money to Jones? [Answer: Almost certainly yes.] (2) Can ABC fire Jones for violating the overtime policy? [Maybe, but watch out for a charge of retaliation for asserting legally-protected rights (the right to overtime)].

#### **REPLACING WAGES WITH "CONTRACT PAYMENTS"**

Many persons working for an organization would prefer, for various reasons, to receive a check with no deductions and therefore assume responsibility for their own taxes. This appears to benefit the employer as well, as there are less bookkeeping issues, in addition to no expenses for Social Security, workers compensation and the various other financial obligations that accompany having "real" employees. Big mistake! The question whether a person is an employee or an independent contractor is not a matter of personal choice, or of agreement between the parties. It is a legal conclusion, and, in cases of doubt, it is far better to resolve it in favor of classifying someone as an employee. A mistake in this area can lead to huge tax liabilities for both the employer and the "contractor," as well as substantial penalties and interest. In extreme cases, criminal prosecutions have occurred. The Internal Revenue Service website contains a wealth of information on the correct classification of employees. A general search of "independent contractor" *within that website* will get you started.

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