

UNDERSTANDING WAGE AND HOUR RULES— ESPECIALLY OVERTIME

By Rebecca Crane and Tim Twigg



A common and costly wage and hour mistake made by employers involves the failure to pay overtime correctly.

Too often doctors fall for myths that prevail in the industry or follow a colleague's pay practices without confirming that s/he is handling things correctly.

This is risky. In recent years wage and hour claims against employers have increased 44% nationwide. Collectively, employers paid \$363.6 million last year as a consequence of inaccurate pay practices, which include improper overtime pay.

Overtime regulations stem from both federal and state laws. On a federal level, the Fair Labor Standards Act (FLSA) requires all non-exempt employees be paid time-and-one-half for all hours worked over 40 in a week. Some states have gone further to mandate overtime pay after a daily number of hours worked, for example all hours over 8 in a day. Thus, the overtime "trigger" for employers could be weekly or daily or both.

For most dental practices, because the typical workweek is 4 days with a total of 32 or 36 hours, overtime is not an issue for the weekly "trigger." That changes when continuing education is involved due to revised continuing education rules.

If you're in a daily overtime trigger state, overtime can easily become a problem when the patient load causes employees to work longer, or there's an emergency to deal with, or employees just aren't able to complete their tasks within 8 hours in a day and effectively work "unauthorized" overtime.

Let's explore some myths about overtime that cause problems for many doctors.

Myth #1: "Salaried" employees are not entitled to overtime pay.

Simply paying an employee a salary does not exempt you from having to pay overtime. The FLSA classifies employees into two categories: exempt and non-exempt. Exempt employees do not receive overtime pay; non-exempt employees do. **"Salaried" is not a category for overtime purposes.**

In order for an employee to be classified as exempt, s/he must perform job duties that fall within the parameters of the FLSA and/or state rules. These duties relate to the employee managing staff or a department, having hiring and firing authority, having independent decision-making ability, being a learned professional, etc. The definitions for exempt status are such that about 95% of all dental office staff members do not qualify and are, therefore, non-exempt.

Non-exempt employees can be paid a salary. There is no rule that says non-exempt employees must be paid by the hour. They can receive a daily, weekly, or monthly salary. Regardless of how wages are paid, they are entitled to overtime pay at all times when their hours exceed the applicable federal and/or state overtime trigger.

Myth #2: Employees who don't get approval to work overtime don't have to be paid overtime.

It would nice if this were true because it could be a very effective method of controlling unauthorized overtime and save the employer a lot of money, but it's not. Whether or not the work performed was permitted, you must pay the employee for any overtime that is worked.

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The only method of controlling overtime pay is to set a policy standard and hold employees accountable. Thus a failure to follow your guidelines could result in disciplinary action (verbal and/or written warnings/suspension/termination), but paycheck deductions are never permitted.

Myth #3: Employees are paid according to the time marked on their time sheets, so if they don't mark extra time, they don't get the extra pay.

While this seems logical, unfortunately the burden is on employers to prove that employees were paid properly. Relying strictly on time sheets will not be enough evidence if the Department of Labor (DOL) is investigating a complaint against you. The DOL will try to determine if there is other evidence present at the time the employee's wages were paid in which the employer "knew or should have known" that overtime was worked, but didn't pay for it. For example, the employee didn't leave his/her desk during lunch or worked over a weekend to complete a task by Monday that was assigned the Friday before. In situations such as these, be sure you verify with the employee that his/her timecard is correct and includes all overtime hours in order to pay correctly.

Myth #4: Employees can choose time off instead of overtime pay if that's what they really want.

Giving employee's time off in lieu of paying overtime is commonly referred to as compensatory time off or "comp time." "Comp time" is not permitted in the private sector.

For dentists in states that do not have daily overtime triggers, the only way around paying overtime is to adjust the employee's schedule within the same week in order to avoid exceeding the weekly overtime trigger. A failure to make this adjustment means overtime must be paid if the trigger is exceeded.

Myth #5: When staff is paid overtime for any time they work more than 40 hours in a week, they need not be paid for the daily overtime hours required by state regulations.

Employers who are covered by their individual state regulations are subject to both the FLSA and the individual state's wage orders and must pay overtime accordingly. Therefore, employers who are covered by daily overtime regulations must pay overtime for any time worked more than the daily trigger for each workday or 40 hours in a work week or **both**, if applicable.

To avoid "pyramiding" of overtime (i.e. paying for overtime twice), the Wage and Hour Division provides that only straight time hours count towards the weekly overtime trigger. Thus, any overtime already paid by the daily trigger are not added again in the weekly total.

Myth #6: My hygienist is an independent contractor and therefore does not have to be paid overtime.

If the hygienist or any worker is indeed an independent contractor, then overtime need not be paid. Unfortunately, most "workers" do not qualify as independent contractors. The relevant issues that are reviewed regarding an individual's status as an independent contractor depend primarily on:

- **Behavioral control**—the "right to direct or control how the worker does the work."



Testimonial

"We as a team really benefit from the newsletters and Ask the Consultant. These cover a wide range of procedure, legal, and ethical questions.

We have all used the information found in the newsletters in helping us use the right dental codes, when to destroy records, and how to dismiss a patient, etc."

Dr. Jennifer Johnson

- **Financial control**—whether the worker has a "significant investment" in the work or can "realize a profit or incur a loss."
- **The relationship of the parties**—whether the worker receives employee-type benefits.
- **How you report payments**—whether you use a W-2 or a 1099. Reporting on a Form W-2 indicates that both your company and the worker consider the worker to be your employee.
- **Intent of your company and of the worker**—whether you and the contractor sign a written agreement stating the worker is an independent contractor. What is the location of the work? What is the source of the "tools" for completing the job?

If the business that receives the service controls not only the results to be achieved, but also the means used in achieving the result, an employer-employee relationship exists. As such, **hygienists rarely qualify as independent contractors**, and therefore must be treated as non-exempt employees and paid overtime accordingly.

Myth #7: Continuing education does not count towards overtime hours.

We often hear this myth expressed because 1) the dentist doesn't think continuing education has to be paid; 2) the dentist differentiates continuing education from the employee's "normal job;" or 3) the dentist doesn't think continuing education counts as "work." All of the above are false and lead to a failure to count the hours at continuing education events and, if applicable, pay overtime.

Without going into detail, continuing education must always be paid. When it does have to be paid it is work time, and it makes no difference that it has nothing to do with the employer's normal job. As such, overtime may be a very real possibility, particularly if the employee worked during the week before the continuing education event.

In summary

Know your state's laws regarding overtime and continue to review the laws in the event they change. Communicate your expectations to your employees regarding overtime. Check employee time sheets to be sure they are being completed accurately and overtime hours aren't being missed. Insure your Office Manager, Payroll Clerk, or whoever handles your payroll, is paying overtime appropriately. The penalty for not doing so can include liquidated damages and civil fines, and a longer statute of limitations if your violations are deemed willful—a costly mistake best to be avoided.



ASK THE CONSULTANT

Q: If our group practice hires a new associate and he is not yet contracted with insurance plans, can he still see patients? If so, how do we bill that... under whose name and does the treating dentist's name go in box #53?

A: Since each insurance company treats this differently, the dental office will need to check with each insurance company for which they have a signed agreement to determine how this is handled. Some carrier contracts may require that all providers in the office participate with them, while others may not.

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