

# Meet the Experts

 [tsheets.com/flsa/7-deadly-sins/](https://tsheets.com/flsa/7-deadly-sins/)

TSheets We Love Employees



## FLSA Violations You Must Avoid

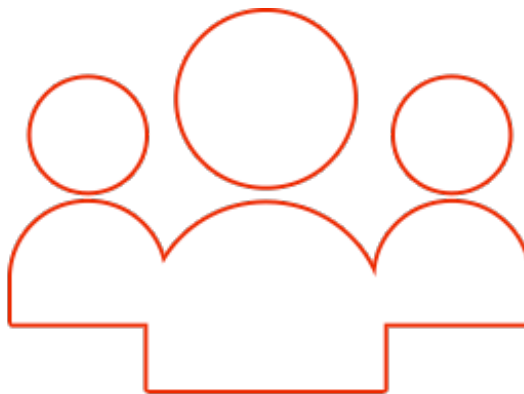
Lawsuits are rising as employers continue to violate the wage and hour provisions of the FLSA. But, in most cases, they're doing it unknowingly.

### Are you one of them?

Ignorance of the law is not an alibi, and it's certainly not a defense against wage and hour lawsuits. Now is the time to take a hard look at your company and ensure you aren't unknowingly committing one of these deadly sins of the FLSA.

## Misclassifying Employees

Over 8.6 MILLION employees are currently misclassified — and that number is only going to grow when the new Department of Labor overtime rule kicks in. The consequences of misclassification can be costly, so, ask yourself, is your team among the misclassified? [Learn More](#)



**Over 8.6 MILLION employees are currently misclassified**



### **Overlooking or Encouraging Off-the-Clock Work**

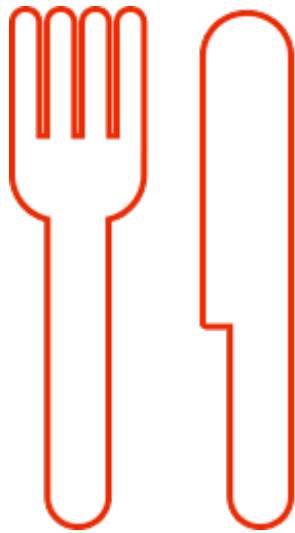
More than 81% of U.S. salaried employees regularly conduct work outside of working hours. But does checking work email, listening to a work related voicemail, or responding to a co-worker's text count as work? And should employees be compensated? [Find Out](#)

**Nearly 16% of U.S. employees put in extra hours 5 to 7 days a week**



### **Failing to Pay Unauthorized Overtime**

Nearly 16% of U.S. employees admit to being "workaholics" in the office — they regularly put in extra hours five to seven days a week. But if you've got an overtime policy that forbids it, do you still have to pay them for that time? [Get the Answer](#)

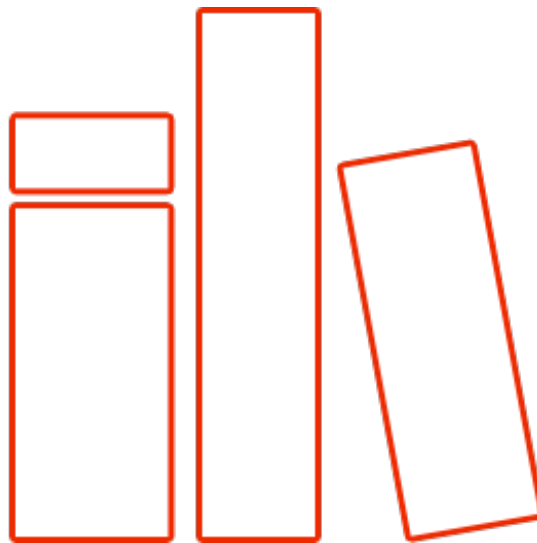


**Only 1 in 5 workers  
step away from  
their desk for a  
midday meal**

### **Not Tracking Breaks Properly**

Research shows that only 1 in 5 workers actually step away from their desk for a midday meal — most prefer to either work through lunch or eat at their desk. If that's the case, should they clock out for lunch, or remain clocked in? Are your employees required to take a break? [Read More](#)

**33% of  
employees  
admit they are  
not required  
to track their  
hours**



### **Keeping Sloppy or Inaccurate Records**

Of the 34,800 workers who responded to a recent survey by the American Payroll Association, nearly 33% of them admitted they are not required to input their hours worked at their jobs. Are your employees among them? Accurate time and payroll records are paramount to defense against an FLSA lawsuit. [Learn More](#)



**65% of bachelor's degree graduates (in 2015) participated in internships**

### **Not Compensating Interns or Volunteers Appropriately**

More than 65% of bachelor's degree graduates from the class of 2015 participated in an internship — and that number is rising each year. Chances are, you'll find yourself hiring an intern within the next several years. Do you have to pay them? [Get the Answer](#)

### **Not Staying Up-To-Date on DOL or State Regulations**

We're facing a record-breaking year in terms of FLSA lawsuits — and those numbers are still on the rise. There are many factors contributing to the spike, but the number one reason is simply this: Employers continue to violate the FLSA — and, most of the time, they do it unknowingly. Are you one of them? [Find out](#)

**Employers  
continue to  
violate the  
FLSA**



**We reached out to the nation's top wage and hour experts to find out how business owners can avoid committing these deadly sins - and what to do if you find yourself at risk.**

### **More FLSA Resources**

Please refer to a professional tax or legal advisor regarding specific requirements of FLSA and how they impact your business. TSheets does not recommend particular employee classifications or practices and leaves those decisions to the discretion of your organization.

# FLSA Deadly Sin #1: Misclassifying employees

 [tsheets.com/flsa/7-deadly-sins/exempt-nonexempt-employees](https://tsheets.com/flsa/7-deadly-sins/exempt-nonexempt-employees)

## Misclassifying Non-Exempt Employees



### Meet Our Experts

## Are your exempt or non-exempt employees classified correctly?

If you're thinking, "I'm not sure," or "What does that even mean?" – you're among the millions of business owners guilty of committing the No. 1 Deadly Sin of the FLSA: Misclassifying Non-Exempt Employees.

Why so deadly? For starters, most business owners don't even realize their employees are classified incorrectly. And if it's been awhile since you've audited your employee classifications, you could be one of them. Unfortunately, ignorance is not an alibi, and the penalties for misclassification are **fierce**.

2016 is expected to be a [record year for FLSA lawsuits](#) – and the danger of misclassification is on the rise. With the [new overtime law](#) scheduled to take effect on December 1, not only will millions of employees who were once considered exempt suddenly qualify for overtime pay (4 to 8 million, to be exact), but millions more employees will find themselves suddenly misclassified – putting you and the more than 30 million small business owners across America at risk of a misclassification lawsuit.

We reached out to the nation's top wage and hour experts to find out how business owners can avoid committing this deadly sin – and what to do if you find yourself at risk. **Keep reading for the answers to your most pressing misclassification questions.**

## First things first, what does the exempt vs. non-exempt status really mean?



The **exempt** vs. **non-exempt** status refers to an employee's eligibility for overtime pay. **Non-exempt employees** are typically paid hourly and are expected to be paid overtime wages. **Exempt employees** are generally paid a salary, as such, they do not receive overtime pay (that is, as long as the salary meets the minimum threshold, which, as of December 1, is \$47,467 per year – and that threshold will continue to rise every three years). For example, if an employee is salaried at less than \$47,467, but is classified as “exempt” (and ineligible for overtime), that employee could be considered misclassified come December 1, 2016. Of course, many misclassification situations aren't quite so black and white – an employee's status is dependant on not just their level of compensation, but also their duties and responsibilities, which is why it's always a good idea to seek the advice of your employment counsel when it comes to correctly classifying your team.

## What penalties can employers expect to see if they have misclassified employees?

“If an employer fails to pay any overtime worked to a misclassified employee, the employee may be owed backpay for the time worked but not paid, liquidated damages (which is essentially doubling of the backpay), statutory penalties, and the employees' attorneys' fees if a claim is made.”

“Payment of unpaid back taxes, interest and fines/penalties on unpaid taxes. Sometimes, the amount of money assessed varies based on willful or unwillful violations.”

### Key Takeaway

The penalties for misclassification are extremely costly and can reach back 2 to 3 years. Correcting your mistake before it reaches a lawsuit is always the better (and often cheaper) option.



## Does most misclassification occur willingly or unknowingly?

“Misclassification happens most often unknowingly. But if you have a good structure and understanding of your employees, any employment law attorney will be able to help you make sure your classifications are on point. It's always good practice to keep those classifications in mind and check that your employees are classified correctly – but it's important to double check with a knowledgeable employment attorney.”

### Key Takeaway

Most misclassification occurs unknowingly. Job titles change, responsibilities shift, and suddenly an employee who was once classified correctly is now a victim of misclassification.



## What can employers do to prevent a situation in which employees are misclassified ignorantly?

“At all costs, employers should avoid arbitrarily classifying workers as either independent contractors or employees. Arguably, the best first step to take is to start with a job or project description. This is a general description what needs to be done; how it gets done; and what type of qualifications are needed to do the work. A job or project description doesn't have to be too formal or detailed, but it should discuss what is ESSENTIAL for doing the work, tools, qualifications, etc.”



## How can an employer determine if they have their employees classified correctly?

“When in doubt, check with an attorney. Most employers have some sort of annual or biannual review process – some way to check in with an employee. During this process, ask yourself, ‘Are they still doing what they were hired to do? Have their responsibilities changed? Is it time to increase their salary? Would a raise boost them outside the overtime threshold?’ If the answer is ‘yes,’ it might be time to reclassify.”



“Employers should conduct an annual or bi-annual classification audit. This could (and should) entail reviewing compensation information, job duties, actual work performed, interviews with the manager or supervisor, a thorough review of organization or department charts and policies, and other information necessary to complete a review of all jobs classified as exempt.”

“Usually a job or project description is the best way to determine classification issues. Once the employer understands a job's essential functions, responsibilities and qualification, they can then accurately determine classification.”



### Key Takeaway

Employers should schedule recurring classification audits or employee reviews to constantly determine whether or not their employees are classified correctly.



## What should an employer do upon realizing they have misclassified an employee?

“In short, fix it! It’s always better to fix it on the front end rather than have a dispute or fine come up on the back end. If you have a misclassified employee, just fix it. I always advise my corporate clients, if you need to change the employee’s status, make a note in their HR file and require both the employee and the manager to sign and date it.”



“There are a couple of different options for employers. The safest option, with least risk, is to re-classify the employee, calculate any potential backpay owed, and pay that employee any backpay owed. The backpay could reach back 2 or 3 years depending on how much risk the employer wishes to avoid. Another option is to re-classify the employee, but pay no backpay. There is still a risk of a lawsuit, but a good communication plan and execution should lessen that risk. Of course, both of these options come with some risk attached, and there are certain precautionary steps employers will want to take before pursuing either option. Therefore, I suggest contacting your employment counsel first before re-classifying any employee.”



“Immediately remedy the problem by re-classifying the employee, and offering to help them with any tax reporting or tax compliance issues. Also, contact your accountant or attorney to determine whether it’s necessary to self-report the matter to the IRS or any other authority.”

## Key Takeaway

If you discover a misclassified employee, reclassify them correctly as soon as possible. Avoid risk by paying the employee any owed backpay. However, there could be a few precautionary steps you need to take before making any major changes, so check with your employment counsel first to determine the best course of action.



## In Short

- Schedule regular classification audits to determine whether or not your employees are classified correctly
- Check with your employment counsel to ensure your classifications are on-point
- If you discover that one or more of your employees have been misclassified, check with your employment counsel first, then reclassify the employee as quickly as possible
- The penalties for misclassification are costly – it’s always better (and oftentimes cheaper) to solve misclassification problems up front

## Meet The Experts

### Maria O. Hart

Maria O. Hart is a member of the Litigation, Trials and Appeals practice group at [Parsons Behle and Latimer](#). Hart’s practice focuses generally on commercial litigation and business law. She has experience representing businesses and individuals in both Idaho and Montana. Her practice involves litigation in both federal and state court pursuing or defending against a variety of issues related to health care law, employment law, and general commercial matters.

### Staci Ketav Rotman



## Staci Ketay Rotman

Staci Ketay Rotman is the Community Investment Officer and Co-Chair of the Wage and Hour Practice Team at [Franczek Radelet Attorneys and Counselors](#). She's the editor and co-author of the firm's wage and hour blog ([wagehourinsights.com](http://wagehourinsights.com)) and she has also co-authored a number of articles on wage and hour topics. Staci advises and represents employers in all aspects of labor and employment law.



## Charles A. Krugel

Charles A. Krugel is a management side labor and employment attorney as well as a human resources counselor. He has more than 20 years of experience in his field and has been running [his own practice](#) for the past 15. He serves small to medium sized companies in a variety of industries. Besides providing traditional labor and employment law services, Charles has negotiated hundreds of labor and employment agreements and contracts.



# FLSA Deadly Sin #5: Inaccurate Records

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 [tsheets.com/flsa/7-deadly-sins/payroll-record-keeping](https://tsheets.com/flsa/7-deadly-sins/payroll-record-keeping)

## Keeping Sloppy or Inaccurate Records

# 62%

of small businesses with  
hourly employees are still  
tracking time using paper  
timesheets or Excel®



## Meet Our Experts

### Will your time and payroll records save you from an FLSA lawsuit?

If they're not unfailingly accurate and consistently kept, the answer is probably no.

And if you're keeping track of employee hours worked by asking your team to track their time on a paper time card, then manually entering that time into your payroll system – you're guilty of committing our fifth deadly sin: Keeping Sloppy or Inaccurate Records.

When it comes to [FLSA lawsuits](#), being able to prove exactly when your employees worked, and how much they were paid, can be a critical defense. Paper time cards are not only inaccurate and prone to human error, but they can be lost, they can be illegible, or they can be padded. And because there's no definitive way to prove that those time cards are correct (or not), they simply won't hold up in court.

On top of that, by manually entering that time card data into your accounting or payroll system, you run the risk of accidentally hitting the wrong number, reading the time card incorrectly, misinterpreting the total hours worked.

Long story short, manual or handwritten records, no matter how neat and organized, simply aren't a good defense – and they won't do a thing to save you from an FLSA lawsuit. If you want to protect yourself, your company, and your

employees, you've got to add "accurate record keeping" to the top of your list – and start immediately.

**How? We reached out to the nation's top wage and hour experts to get the answers to your most pressing record keeping questions.**

## How can accurate records protect employers against FLSA lawsuits?

"Maintaining accurate records, and taking the required steps to ensure that those records are accurate, may be the most important thing that employers can do to avoid FLSA lawsuits – or, at least, put themselves in the best possible position to defend against them. Aside from misclassification claims, most FLSA claims revolve, in some way, around allegations that employees were not paid for all time worked or were not paid at the right rate for all time worked. To resolve those claims, the courts will need to see an employer's time and payroll records, among other things. "



"It is critical for an employer to be able to prove that their time and payroll records are accurate, and the reason for that is made clear if an employer can't show that their time and payroll records are accurate – or if becomes clear that they aren't accurate. Once that happens, it is exceedingly difficult to establish that employees' claims are meritless. The burden is on the employer to pay employees for their work and to do so accurately."

"This issue is particularly problematic when it comes to allegations that employees performed work off-the-clock work before work hours, during breaks, or after their workday ends. If employers do not have policies that require employees to report all time worked, or if managers do not take those policies seriously, then the accuracy of the employer's time and payroll records comes into question."

"Due to: (1) the relative ease with which an employee can prove a potential [wage and hour violation](#) if the employer does not keep accurate employment records; (2) the potential cost of that violation in unpaid wages, unpaid overtime, punitive damages, and attorney's fees, and (3) their statutory duty to do so, employers are strongly advised to create and maintain employment records in accordance with the FLSA. Many states have additional or different recordkeeping rules; employers are strongly advised to familiarize themselves with these rules to ensure compliance."



"Accurate records is the "Golden Grail" for bureaucrats. They're absolutely necessary to defending classification claims. Without accurate records, it's nearly impossible for an employer to credibly defend a classification case."

### Key Takeaway

Keeping and maintaining accurate time and payroll records is the most important thing you can do to avoid or defend against FLSA lawsuits.



**Start Tracking Time for FLSA Compliance**

## What records are employers required to keep?

“The FLSA requires covered employers to keep certain records for covered and [non-exempt workers](#). The required records include the employee’s identifying information and information showing the employee’s hours worked and wages earned. The FLSA further requires that these records be accurate.

**Employers must keep at least the following basic records:**

1. Employee's full name and social security number
2. Address, including zip code
3. Birth date, if younger than 19
4. Sex and occupation
5. Time and day of week when employee's workweek begins
6. Hours worked each day
7. Total hours worked each workweek
8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
9. Regular hourly pay rate
10. Total daily or weekly straight-time earnings
11. Total overtime earnings for the workweek
12. All additions to or deductions from the employee's wages
13. Total wages paid each pay period
14. Date of payment and the pay period covered by the payment

**The following records must be kept for at least three years:**

- Payroll records;
- Collective bargaining agreements; and
- Sales and purchase records;

**The following records must be kept for at least two years:**

- Time cards;
- Piece work tickets;
- Wage rate tables;
- Work and time schedules; and
- Records of additions to or deductions from wages.”

“Any records concerning any financial transactions between a contractor and employees. More specifically, any contracts, agreements or understandings concerning anything involving scope of services or work. Employers should also [track employee time](#) (tracking contractor isn't usually necessary).”





## What are the consequences or pitfalls of inaccurate record keeping?

“Records must be open for inspection by the DOL’s investigators, who may require the employer to make computations and transcripts. An employer’s failure to maintain accurate employment records can be to its detriment in an investigation or a lawsuit.”

“The Supreme Court of the United States has held that employees will not be penalized for the employer’s insufficient records because doing otherwise would encourage the employer’s failure to meet its statutory duty. All an employee has to do to prove that he or she has performed the work for which they were improperly compensated is to “produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” The burden then shifts to the employer to show “the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence.” If they cannot, the court can award damages to the employee. Employees are permitted to prove their hours worked based on their own testimony and the testimony of their co-workers. Therefore, it is important that employers maintain accurate records and employers should avoid altering time records or, at the very least, minimize the altering of records and have the employee acknowledge the altered record.”



## What is the most egregious example of poor record keeping you have come across?

“Fabricated payroll documents. Payroll documents that were obviously created by hand, and worse yet, they were undated, so there was no way to know what time periods the records applied to. There are some who would argue that handwritten records are the worst, but I disagree. As long as the records appear legitimate and accurate, I don't care if they're written, typed or in code.”



## How can employers ensure their records are accurate?

“From a legal perspective, all I look for is that a company has a consistent way to track hours. How a business tracks hours is up to them. However, the easier it is, the more likely employees will do it. Employees need to track their hours so they know what they’re entitled to, and employers need to keep an accurate record of those tracked hours to know what their employees are owed. Tracking time should be a part of the policy, and expectations need to be clear: This is how we track time, this is you’re required to track, etc.”

“There's a number of ways. One way is to randomly select payroll records and have them independently audited by an outside auditor. Another way is to use bonded, licensed or certified payroll companies.”



## Key Takeaway

Consistently using an [automated time tracking system](#) is an easy way to keep accurate records – protecting both



you and your employees.

## In Short

- Without accurate and consistent records, you won't be able to defend yourself against an FLSA lawsuit – handwritten or sloppy records simply won't cut it
- Use an automated time tracking system and require employees to track time consistently – make it your policy



## Meet The Experts

### Michael S. Kun

Michael S. Kun is a Member of [Epstein Becker Green](#) in the Employment, Labor & Workforce Management practice, in the firm's Los Angeles office. He is also the national Chairperson of the firm's Wage and Hour practice group. Kun speaks before professional and business groups on a variety of employment-related topics, and his is the co-editor of the wage and hour defense blog ([wagehourblog.com](#)). Additionally, Kun is one of the creators of the [Wage & Hour Guide for Employers](#) app, which provides employers with easy access to federal and state wage and hour laws.



### Maria O. Hart

Maria O. Hart is a member of the Litigation, Trials and Appeals practice group at [Parsons Behle and Latimer](#). Hart's practice focuses generally on commercial litigation and business law. She has experience representing businesses and individuals in both Idaho and Montana. Her practice involves litigation in both federal and state court pursuing or defending against a variety of issues related to health care law, employment law, and general commercial matters.



### Jonathan M. Young

Jonathan M. Young focuses his practice on labor and employment matters, including wage and hour claims, class action benefit claims, class action contract and tort cases, state Attorney General investigations, commercial litigation, Department of Labor investigations and banking settlements.



### Charles A. Krugel

Charles A. Krugel is a management side labor and employment attorney as well as a human resources counselor. He has more than 20 years of experience in his field and has been running [his own practice](#) for the past 15. He serves small to medium sized companies in a variety of industries. Besides providing traditional labor and employment law services, Charles has negotiated hundreds of labor and employment agreements and contracts.

# FLSA Deadly Sin #6: Not Compensating Interns

 [tsheets.com/flsa/7-deadly-sins/hiring-unpaid-interns](https://tsheets.com/flsa/7-deadly-sins/hiring-unpaid-interns)

## Not Compensating Interns or Volunteers Appropriately



### Meet Our Experts

#### You just hired an intern ... do you have to pay them?

"That's the beauty of interns!" you might be thinking. "They work for free!" But the FLSA might disagree.

As more and more student interns enter the job market (a by-product of society's relatively new decision that no college degree is complete without an internship), the number of [FLSA violations](#) concerning the payment of interns and volunteers has spiked – and the two are directly correlated.

The fact of the matter is, many interns deserve to be paid – if they're benefiting your company in any way, shape, or form (more than they're benefiting their own education), they're most likely entitled to compensation. So, if you're attempting to use your intern for free labor, you could be guilty of committing our sixth deadly sin: Not Compensating Interns or Volunteers Appropriately.

The truth is, there are strict guidelines that must be followed when it comes to hiring an intern or volunteer – and even stricter guidelines when it comes to compensating them correctly. As with most FLSA regulations, it can be a

tricky path to navigate – it all depends on the intern or volunteer’s age, responsibilities, and the number of hours they work (among many others) – which is why we reached out to the nation’s top employment experts to get the answers to your toughest questions.

## What’s the difference between an intern and a volunteer?

“In its simplest form, the FLSA governs the way that businesses pay their employees. While most US workers are considered “employees” within the meaning of the FLSA and must therefore be compensated for their work, there are some limited exceptions to this rule, including for interns and volunteers. These exceptions are important because if a particular intern or volunteer is not considered an employee under the FLSA, then he or she is not entitled to minimum wage and overtime compensation as would otherwise be required by federal law.”



## At what point does an intern need to be paid?

“According to Fact Sheet #71, employers must classify and pay interns as if they were employees unless the employer-intern relationship meets every one of the following six criteria:

- The internship is similar to training given in an educational environment
- The internship experience is for the benefit of the intern
- The intern does not displace or supplant regular employees, or perform duties traditionally rendered by regular employees
- The employer derives no immediate advantage from the intern’s activities (ideally, the intern impedes the employer’s operations)
- The intern is not necessarily entitled to a job at the conclusion of the internship
- The employer and the intern understand, preferably in a signed writing, that the intern is not entitled to receive remuneration for his/her work



According to the DOL, if the internship does not satisfy all six of these criteria, the employer must pay and treat its interns as if the interns were regular employees.”

“In the wake of the DOL’s publication of Fact Sheet #71, unpaid interns inundated federal and state court dockets claiming violations of the FLSA and other applicable minimum wage and overtime laws. Several such lawsuits already have resulted in important decisions regarding the circumstances under which companies must pay their interns. One such decision was issued by the Second Circuit Court of Appeals – which covers New York, Connecticut, and Vermont – last summer (and was amended in January 2016).”

“In that decision, the federal appeals court rejected the DOL’s six-factor test, ruling that the agency’s test is too rigid. Instead, the Court of Appeals adopted the “primary beneficiary” test urged by the defendants to determine an intern’s employment status. Under this malleable standard, an employment relationship is created when the benefits provided to the intern are greater than the intern’s contribution to the business’s operations. As the Court explained, this ‘requires courts to weigh a diverse set of benefits to the intern against an equally diverse set of benefits received by the employer without specifying the relevance of particular facts.’ To assist with this balancing act, the Second Circuit identified seven non-exhaustive factors that courts should consider in determining whether a worker is an

employee or an intern under the “primary beneficiary” test. These factors include the extent to which the internship provides training that would be similar to that which would be given in an educational environment, and the extent to which the internship is tied to the intern’s formal education program. The Court nevertheless made clear that other relevant evidence may be considered in determining an intern’s employment status, and no one single factor is dispositive.”

“If the employer would have hired additional employees or had their staff been expected to work additional hours had the employer not used interns, the interns should be paid under the FLSA”

Jonathan M. Young

“First, as a best practice, internships should be of a fixed duration which is established prior to the start of the internship. Unpaid interns should not be used in lieu of regular workers or to augment an employer’s workforce during specific periods (e.g., holidays, summers, etc.). ”

“Although the FLSA broadly defines employment, and the DOL views most private sector interns as employees, there are some circumstances where an intern may work without compensation. The Supreme Court of the United States has held that the phrase “suffer or permit to work” does not include a person that serves only their own interest as an employee of another who provides aid or instruction. In other words, interns that receive training only for their own educational benefit could be exempt from the FLSA rules regarding compensation.”

“Generally, the more the intern’s work is dedicated to a classroom, academic, or training experience (e.g., if the internship is done in conjunction with the intern’s school or the intern receives academic credit), the more likely the intern will be seen as exempt from the FLSA. If the intern routinely contributes to the business’s actual operations, or the business is dependent on the intern, it is more likely that the intern will be subject to the FLSA.”

“Employers should be advised that the preceding information applies only to the FLSA. Many states and municipalities have their own tests that control employment determinations of interns.”,

“If the intern replaces or augments the work of an existing or prior employee, the benefit of the internship starts to appear to benefit the employer rather than the employee and if the internship is not tied to specific curriculum or training goals the internship looks more like work subject to [wage and hour laws](#) not educational training. Notably, a toll free DOL hotline dedicated to interns has been adopted to report suspected violations.”

## Key Takeaway

There are strict (some argue “too strict”) guidelines determining whether or not an intern deserves to be paid — but, as a rule of thumb, you should ask yourself, “Who is receiving the primary benefit of this internship?” If the answer is not, “the intern,” you should probably be paying them. As always, check with your employment counsel for the correct course of action.







## At what point does a volunteer need to be paid?

“The FLSA exempts individuals who volunteer their services to public agencies from the definition of “employee,” so long as:

- the individual does not receive, nor expect to receive, any compensation in consideration for his/her services (although the individual may collect paid expenses, reasonable benefits, or a nominal fee)
- the individual possesses a civic, charitable, or humanitarian purpose for providing the services
- the services are provided without pressure or coercion
- the services rendered are not the same type of services rendered by the individual in his/her capacity as an employee of the same entity



“This exception only covers public sector employees.

In addition, the US Department of Labor has taken the position that individuals may, under certain circumstances, lawfully volunteer their time, typically on a part-time basis, to a religious, charitable, or similar non-profit organization, so long as there is no expectation of compensation. Nevertheless, successful lawsuits have been brought against non-profit organizations for misclassification of employees as volunteers. In a similar vein, the Department of Labor generally does not consider individuals who volunteer to work on commercial activities operated by nonprofits as true volunteers in the eyes of the law. Further, according to the Department of Labor, individuals may not volunteer their services to private, for-profit businesses.”

“Volunteers can only be used in the nonprofit sector. For profit employers are expected to pay for work and cannot use volunteers. Charitable organizations should also examine whether or not its volunteers are actually employees. If the volunteer is doing something normally associated with a business rather than ministering to the needs of the people being served, then a red flag is raised as to the potential that the wage and hour laws apply. If the volunteer is receiving some tangible benefit for volunteering this may be evidence that the volunteer is actually an employee rather than a volunteer. In addition employees of a charity may not “volunteer” to do work which is the same type work which they typically do for pay. If it appears a volunteer to a charitable organization is actually doing the work of an employee unrelated to the direct services





to the clientele of the charity or receives a tangible benefit for the work then a suspicion is raised that the volunteer is actually an employee. A volunteer's expense may be paid by the employer without fear of losing the FLSA exemption."

### Key Takeaway

Volunteers are just that: volunteers — they volunteer their services to public agencies without the expectation of payment. There are a few key guidelines that help define whether or not you've got a volunteer on your hands, but, when in doubt, it's best to check with your employment counsel.

## Are there restrictions on how many hours an intern or volunteer can work?

"There are restrictions on the hours that a minor may work. These vary by state."

"I'm not aware of any, but every state is different. There's definitely no federal law. However, as a general rule, it's a good idea to not have them work more than 40 hours in a workweek."

### Key Takeaway

There are no restrictions on the number of hours and intern or volunteer can work (unless they are a minor), but it's wise to keep their weekly hours under 40.



## Do minimum wage rules apply to interns?

"If they do not meet the criteria for being a volunteer or unpaid intern, both the minimum wage laws and [overtime laws](#) apply."

"Not yet, but this seems to be the direction we're heading in on both state and federal levels. There's much greater scrutiny being placed on unpaid and low paying internships. It's possible that either Congress or the President may try to pass something regulating the usage and payment of interns this year."

### Key Takeaway

If the intern falls into the category of "paid intern," minimum wage laws apply.





## Do overtime rules apply to interns?

“The Fair Labor Standards Act broadly defines the term “employment]” as including to “suffer or permit to work.” Covered and non-exempt workers who are “suffer[ed] or permitted to work” must be compensated for all work that they perform for their employers. The United States Department of Labor, generally speaking, views interns in the “for profit” private sector as employees rather than as trainees. These interns must therefore be paid at least the minimum wage and overtime compensation if they work more than forty (40) hours in a workweek.”

“A properly classified intern or volunteer need not be paid overtime. If the six criteria set out above are not met the intern is probably an employee and must be paid.”



### Key Takeaway

If the intern falls into the category of "paid intern," overtime laws apply. If they are unpaid, they need not be paid overtime.



## What are the most common mistakes employers make when it comes to hiring interns or volunteers?

The most common mistake is assuming that by labeling an individual an intern or volunteer and the individual agrees not to be paid that the employer is not obligated to comply with the wage and hour laws. This is not the case.

James R. Mulroy

“The Department of Labor and the courts will look at what the actual assignment entails, whether the hiring appears to be a move to replace wage earners and the primary benefit test to determine whether or not the wage and hour laws apply. Notably, there are other obligations which also might attach if these individuals are determined to be employees such as the employer's responsibilities to pay withholding taxes. A second major problem is not properly supervising an intern program. Some employers simply drop interns off to a group manager with no instruction. The manager then assigns the intern tasks and errands which typically offer no educational benefit. If an employer adopts an internship program, it must train its managers how interns are to be used and not simply place them in a “goffer” status.”



“Treating them too much like employees. Generally, interns and volunteers aren't supposed to take away work from regular employees, and too often, that's exactly what happens. This is one reason why there's greater scrutiny being placed on internship programs. Another mistake is giving interns and volunteers too much access to private or confidential information.”

### **Key Takeaway**

Don't confuse your interns with employees — they are there for a purely educational benefit. They are not intended to take work away from regular employees, and should be excluded from private company information.



## **Start Tracking Time for FLSA Compliance**

### **What steps can employers take to ensure they are complying with intern or volunteer regulations?**

“Beyond just federal law, state and local laws must also be considered when hiring interns and volunteers. For example, the New York Department of Labor has identified 11 factors – five more than the US Department of Labor – that a business must consider in determining an intern's employment status. Accordingly, employers, especially private, for-profit employers, must familiarize themselves with the applicable state and local law before implementing volunteer and unpaid internship programs.”



“The Federal wage and hour laws are complex involving statutes, regulations as well as administrative and court decisions. The U.S. Department of Labor website is a good place to get basic information. However, there are also many state and local wage and hour laws which add to the complexity of the issues. Some state labor websites can provide good background in respect to that state's policies. However, obtaining the advice of an experienced practitioner in wage and hours matters before instituting an internship or volunteer program is the best advice. The cost of getting good litigation avoidance advice on the front end is far preferable to the greater expense of defending a lawsuit or DOL administrative action.”



“Do your due diligence before using volunteers or interns. Understand where the law is on this topic and what factors make someone an employee as opposed to an intern or volunteer. Factors to consider include any sort of compensation or benefit derived from the internship, the duration of the internship, and who manages the internship.”

### **Key Takeaway**

Check with your employment counsel to ensure you're following both state and federal laws.



# What are the most common child labor violations (in regards to student interns)?

“The most common violations include hours of work (look to your state laws as well as the FLSA) and allowing child labor to work in hazardous locations or activities as defined in DOL and state policies.”

“It depends on the state, but generally speaking, student interns can’t work overtime, can’t work past certain curfews, can’t take away work from regular employees, and can’t be called an employee. Moreover, state laws usually dictate how much student interns can earn (if anything).”

## Key Takeaway

It varies by state, but there are often specific regulations when it comes to minors or student interns.

## In Short

- There are strict guidelines you need to follow when determining whether or not to pay your intern. When in doubt, the answer is almost always, "Yes, they deserve to be paid."
- There is no restriction on the number of hours an intern can work (unless they are a minor), but both minimum wage laws and overtime laws apply.
- Keep in mind that your state laws could have even more guidelines when it comes to interns and volunteers. Always check with your employment counsel to determine the correct course of action.

## Meet The Experts

### Mark S. Goldstein

Mark S. Goldstein is a senior associate in the New York office of [Reed Smith](#) and a member of the firm’s Labor and Employment. Goldstein’s practice is focused on defending employers in a wide range of employment litigation matters. In addition, Goldstein has provided workplace training to managers and Human Resources professionals and has drafted employee handbooks and individual workplace policies to ensure compliance with federal, state, and local law. He is also a contributor to the Firm’s blog ([employmentlawwatch.com](#)). On Twitter, follow [@MarkGoldstein](#).



### Jonathan M. Young

Jonathan M. Young focuses his practice on labor and employment matters, including wage and hour claims, class action benefit claims, class action contract and tort cases, state Attorney General investigations, commercial litigation, Department of Labor investigations and banking settlements.



### James R. Mulroy



James R. Mulroy is the Office Managing Principal of the Memphis office of Jackson Lewis P.C. He has more than 30 years of trial and litigation experience, and he has represented clients in dozens of labor and employment cases. He regularly counsels clients on a broad spectrum of employment related issues including FLSA compliance.

### **Charles A. Krugel**

Charles A. Krugel is a management side labor and employment attorney as well as a human resources counselor. He has more than 20 years of experience in his field and has been running [his own practice](#) for the past 15. He serves small to medium sized companies in a variety of industries. Besides providing traditional labor and employment law services, Charles has negotiated hundreds of labor and employment agreements and contracts.

