



# Understanding Overtime, Minimum Wages, and Unpaid Wages



# Introduction

# INTRODUCTION

Whether or not you have your dream job, in the end it's all about the Benjamins. You expect to be paid a fair wage for the hours you worked. But this doesn't always happen.

The controlling federal act that governs wages is called the Fair Labor Standards Act (FLSA), and it establishes the federal minimum wage and overtime eligibility and standards, among other things.

Florida has its own minimum wage that is slightly higher than the federal one. Also, state courts have set up rules that require employers to pay wages earned. We'll go through these rules one by one.



# Your overtime rights



# YOUR OVERTIME RIGHTS

Do you feel overworked? Most Americans do; in one study by the Families and Work Institute, about 25 percent of respondents said they worked 50 or more hours a week.

That's why overtime laws are so important. Unfortunately, failing to pay overtime premiums is one of the most common wage violations.

Federal law says that an employer must pay a qualified employee 1.5 times his or her regular pay for all hours over 40 in one workweek. This law encourages employers to keep hours reasonable, and it compensates those who've put in the extra time.

So for example, if you're normally paid \$10 an hour, you must be paid at least \$15 an hour for each hour over 40 that you work in one week, which is a regular seven-day period that can begin and end on any day. (Averaging hours over two or more weeks is not allowed.)

Seems pretty simple, right? Still, employers often don't pay overtime. Some companies stop paying at 40 hours—even if the employee works more. Other employers continue paying the overtime-qualified individual at his base pay. That's illegal.

Many employers try to bend the rules or ignore them. They hope you won't notice or don't know what you're entitled to under federal law. Some are deliberate—and when that's the case, you might be entitled to more than just the wages you've earned.

We once represented a police officer who, in addition to his regular duties as a school resource officer, cared for a police dog that was part of the police's K-9 unit. He took the dog home with him and had to spend time feeding it, walking it, and otherwise making sure the dog got the necessary attention each day.

One day, the police department stopped paying for overtime relating to the dog's care because of budget constraints. However, the law doesn't care about an employer's financial woes. This police officer had earned overtime for the work he put into caring for the police dog. We worked zealously for our client, getting him a favorable settlement with the city.

A man with short grey hair and glasses, wearing a white long-sleeved shirt, is sitting at a desk. He is looking down and writing in a notebook with a pen. A laptop is open on the desk to his right. The background is a blurred office environment with windows and lights. A teal banner is overlaid across the middle of the image, containing white text.

Keeping records of your overtime

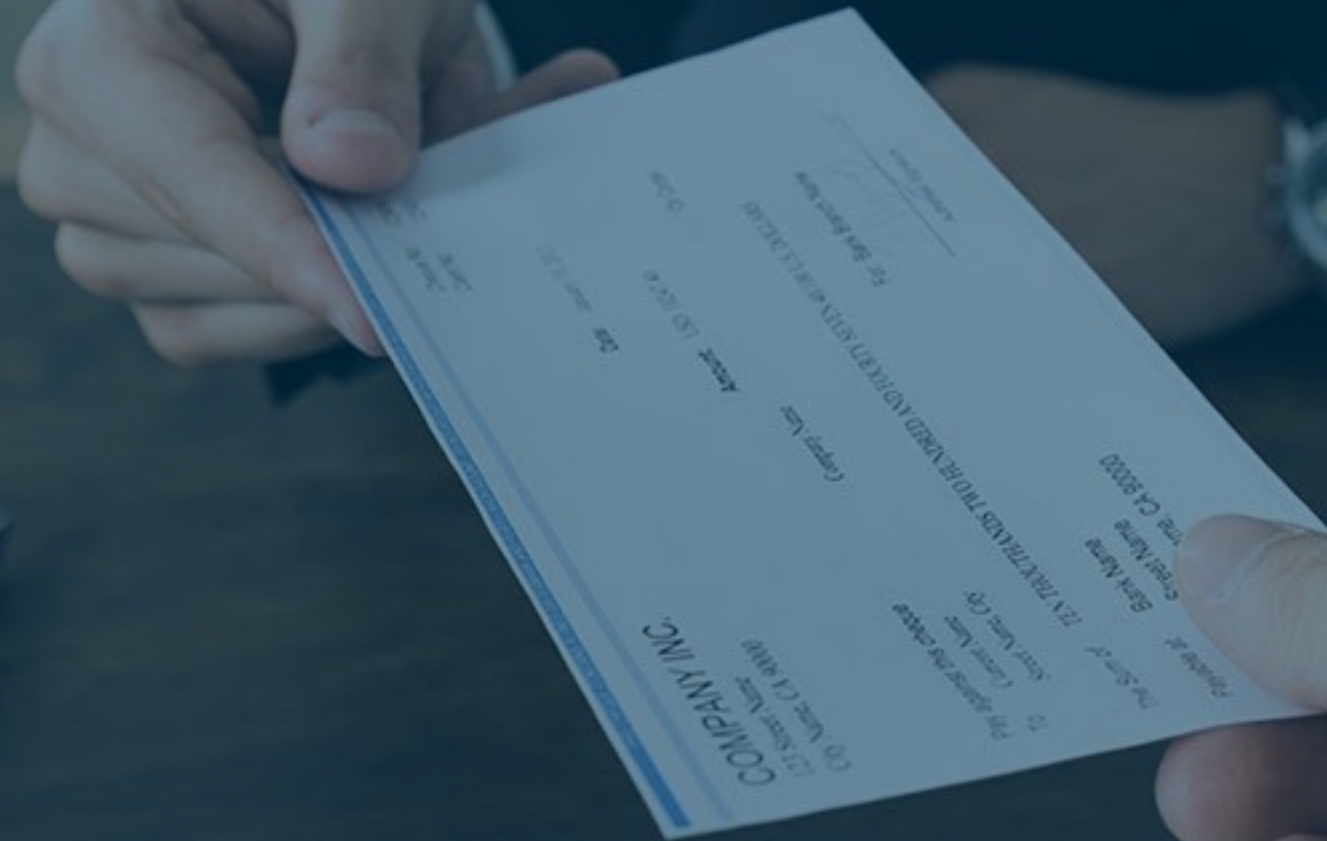
# KEEPING RECORDS OF YOUR OVERTIME

You may be keeping track of your hours worked and notice that you weren't paid overtime for certain time periods. The more details you have about your company's violations, the better. That said, the FLSA requires that employers keep accurate records of the hours their employees worked and the wages they were paid.

If your overtime or minimum wage claim is filed in court, your attorney can ask your employer to provide those records to help prove your case. This is part of the information-gathering process that occurs after a lawsuit is filed (called "discovery.") Indeed, under the FLSA, if an employer fails to keep accurate time records, then an employee's estimation of how many hours he worked is presumptively accurate. So don't fret if you don't know exactly what you are owed.



# Minimum wage





# MINIMUM WAGE

You've heard of the minimum wage. It's a basic employment law, so ingrained into our workforce that it's hard to believe that back in the 1930s when it was passed, it was controversial.

Now, the debates are whether it's high enough. In Florida in 2016, it was \$8.05.

Here again, the rules set out in the FLSA seem straightforward: Employers must pay their employees at least the minimum wage. But there are exceptions for small businesses, independent contractors and managers. And there are special rules for tipped employees.

Also, issues of minimum wage and overtime often overlap. For example, if you are paid \$9 an hour and regularly work 50 hours a week—if your employer didn't pay you anything for those 10 hours you worked after hitting 40 hours, you'd have made \$360 in one week. That amount divided by the hours you actually worked (50) equals \$7.20 an hour. That's below the minimum wage, so you would have a minimum wage claim (because you are only making \$7.20 an hour) and an overtime claim (because you weren't paid 1.5 times your base rate for hours 40-50).

If you're not getting paid properly for the hours you worked, the FLSA is designed to protect you. Talk to an employment law attorney to determine whether you're covered.





# Minimum wage and overtime exemptions

# MINIMUM WAGE AND OVERTIME EXEMPTIONS

If you're a salaried employee, you might be wondering what overtime even is! Maybe you've never received overtime. You might be wondering if that's legal.

Not everyone gets overtime protections under the FLSA. The act has provided several exemptions for both overtime and minimum wage. The big one that affects many workers is an exemption for salaried employees in executive, professional or managerial positions.

To fall under this exemption, the workers must meet certain tests regarding their job duties and be paid a salary. For years, that salary was \$455 a week. At that rate, "managers" at fast food restaurants would often meet this exemption and be forced to work long overtime hours without that 1.5 premium pay.

The overtime exemption was meant to only exempt those who truly were in "white-collar" managerial positions—who made important business decisions and had the ability to hire and fire people. But it started to sweep up anyone who made \$455 and had a fancy title.

In a major victory for the middle class, the Department of Labor announced in 2015 that it would be fixing the problem by raising the salary threshold to \$50,440, meaning that workers—regardless of title or duties—are eligible for overtime if they earn less than \$50,440 a year (\$970 a week). Some estimate this new rule will provide overtime pay for about 5 million workers. At publication time, this change had not yet been put into effect.

There are similar exemptions for employees who make more than \$455 a week and either (1) work as an "administrator" with the primary duty of working directly on the management or general business operations of the employer, exercising discretion with respect to significant matters, or (2) work as a "professional," doing duties that require advanced knowledge and exercise of discretion and judgment, or originality in a field of artistic or creative endeavor.

Even if you make a salary of more than \$455 per week, your status as a salaried "manager" or "supervisor," or as an "administrator" or "professional" doesn't necessarily mean you meet the overtime exception. If you don't have certain job duties or responsibilities, the court might recognize your title as an excuse to deny you overtime.

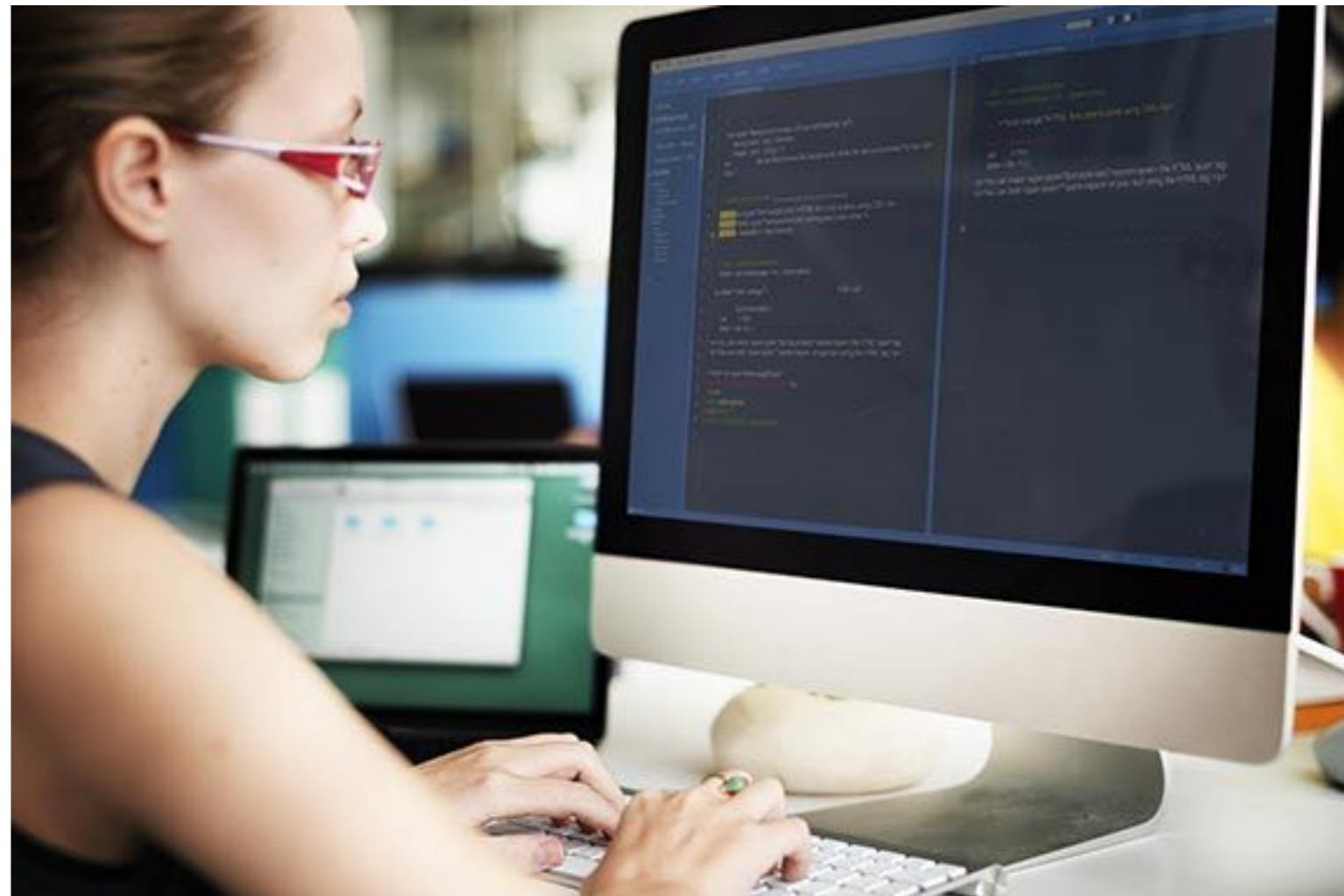
# MINIMUM WAGE AND OVERTIME EXEMPTIONS

Here, the courts will be asking whether the employee's primary duty was management, and whether the employee had the authority to hire and fire employees. Did the employee spend most of his time doing non-management tasks, like stocking or sales? Or did he mainly do exempt tasks, such as training employees, directing work, appraising employees' productivity, managing the budget, and making hiring and firing decisions?

There are other exemptions to overtime, too:

- (1) **The computer employee.** This type of employee must either be paid on a salary or fee basis—at least \$455 a week or \$27.63 an hour—and the employee must be a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field. Here, the employee's primary duties must consist of certain systems analysis, design or development of computer systems, programs or operating systems.
- (2) **The outside salesperson.** Here, the employee's primary duty must be making sales calls, taking orders or making contracts for services—and the employee must usually be doing this away from the employer's place of business.
- (3) **Highly compensated employees.** Employees doing non-manual work who make \$100,000 or more a year are exempt if they regularly do at least one of the duties of an exempt executive, administrative or professional employee, as described earlier.

Additionally, independent contractors might not be considered covered "employees." That means if you are the type of worker getting a 1099-MISC tax form for doing freelance work, you likely aren't considered an employee under the FLSA, and that means the business doesn't owe you overtime or minimum wage.



# MINIMUM WAGE AND OVERTIME EXEMPTIONS

This is often not a clear-cut issue. Currently, it's in dispute with ride-sharing companies, like Lyft and Uber, who say their workers are independent contractors and not covered employees. The U.S. Supreme Court has said that whether someone is an employee cannot be based on a single characteristic. Instead, the courts consider the whole activity and the economic realities of those involved. Though no single factor will decide the issue, these are the issues courts will usually consider:

- (1) The extent to which the worker's services are an integral part of the employer's business.
- (2) The permanency of the relationship. (How long has the worker worked for the company?)
- (3) The amount the worker has investment in tool, facilities, and equipment needed to do the job. (Does the worker use his own materials, tools or equipment?)
- (4) The nature and degree of control the employer has over the employee. (Who decides on what the hours worked, pay rate, how the work is performed, etc.?)
- (5) The worker's opportunities for profit and loss. (For example, did the worker make any investments in insurance or bonding? Can the worker make more of a profit by doing the job more efficiently?)
- (6) The level of skill required in performing the job and the amount of initiative and judgment required. (Does the worker take initiative in getting work and advertising? Or is the person economically dependent on the employer?)

These aren't required elements but rather considerations for the court.

Finally, employers themselves must meet a few rules in order to be required to meet the minimum wage and overtime standards set in the FLSA. Here, the law is very particular, but in short, the employer usually has to make at least \$500,000 a year, and the business must involve some sort of commerce across state lines. For medium to large businesses, this requirement is usually easy to prove.

The law includes the following businesses regardless of how much they make each year: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state, and local government agencies.

Employees of businesses that are not covered enterprises under the FLSA still may be subject to its minimum wage and overtime pay if they are individually engaged in interstate commerce. This includes people who work in communications or transportation or regularly use the mail or phones to reach people in other states—pretty common work-related activities!

As you can see, the FLSA provides broad coverage and most employees are covered by this important law. Still, there are many exceptions, and it's best to talk to a qualified attorney to find out if you are entitled to the protections offered by the FLSA.

# Special issues for tipped employees



# SPECIAL ISSUES FOR TIPPED EMPLOYEES

In the service industry, most of employees' wages are comprised of tips. This is how employers are allowed to get away with paying far below minimum wage to these employees. However, the tips must get the employee at least to the minimum wage.

The numbers can change year-to-year. In 2016, in Florida, the minimum wage is \$8.05, and employers can claim a tip credit of up to \$5.03, meaning they only have to pay the tipped employee \$3.02, as long as the employee's tips bring his or her wage up to the minimum wage threshold (again, \$8.05).

There are several ways employers break the law when it comes to tipped employees.

For one, the employer must ensure it is paying the base amount and that the tips do indeed get the employee at least to the minimum wage.

Also, the FLSA requires that three conditions be met before an employer can claim a tip credit: (1) the employee must qualify as a "tipped employee," (2) the employer must tell the worker of the tip credit before it's taken and—most importantly—(3) the employee must be able to keep the tips.

That last part about being able to keep the tips is what makes "tip pools" risky for employers. A tip pool is when an employer adds the tips together and distributes them to various workers. If done improperly, it can lead to an invalidation of the minimum wage tip credit.



# SPECIAL ISSUES FOR TIPPED EMPLOYEES

First, a “tipped employee” is “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” That includes waiters, bartenders, bellhops, and busboys, as long as they regularly and customarily receive tips at their job. Generally, there needs to be customer interaction.

Tip-pooling is allowed among employees who “customarily and regularly” receive tips—but it’s illegal if it includes workers who are not tipped employees. This usually crosses the line when people like dishwashers, janitors, chefs, cooks, or management get part of the tip pool.

The reason behind this rule is that people subject to the minimum wage tip credit can’t be forced to share with people who are already receiving the full minimum wage—versus \$3.02 in Florida.





# An improper tip pool



# AN IMPROPER TIP POOL

Tip pooling recently got a Tampa restaurant in hot water.

Wenzel Fenton Cabassa represented 31 employees of the restaurant—all of them waiters or bartenders—who were illegally forced to share their tips with others.

At this particular restaurant, the servers and bartenders were required to pay \$5 a day to pay either the salad maker and/or dishwasher. Also, all servers who worked banquets had to pay fees to the restaurant by mailing cash to the company's Orlando office via FedEx. That money was given to the employees who coordinated the banquets.

The salad makers, dishwashers and banquet coordinators were non-service staff members—people who did not “customarily and regularly” receive tips. Therefore, the restaurant’s practice violated the FLSA’s tip pool mandates.

Also, because of the unlawful tip pool, the minimum wage tip credit was invalidated, and the servers and bartenders were not paid minimum wage or overtime.

This case started with a couple servers and grew to 31. Many of them were long-time employees who had put up with these illegal practices for a long time. It just got to be too much. It felt unfair that the company, which was making plenty of money, was using the server's' own hard-earned tips to pay other employees, who they company should have been paying itself!

All the way, the attorneys and staff at Wenzel Fenton Cabassa informed the employees of their rights and fought the restaurant for the wages they had earned. The case ended in a favorable settlement of \$175,000.





You did the time, you should be paid: Common illegal deductions

# YOU DID THE TIME, YOU SHOULD BE PAID: COMMON ILLEGAL DEDUCTIONS

**Lunch deductions:** Employers sometimes automatically deduct 30 minutes or 1 hour from each day, assuming that their workers are taking meal breaks. However, employees often work through lunch or eat at their desk, taking calls or replying to emails. Some eat in their car while driving to the next work site. This is work time, so the employee must be paid for it.

Generally, the rule is that employees must be paid during short breaks (about 5 to 20 minutes) offered by the employer. This is different than an uninterrupted 30-minute break during which the employee actually does take a meal break; that is not compensable. But it truly needs to be a break—no phone calls, emails, driving, or work-related tasks.

**On-call/wait time:** If you are required to be on-call for your employer, and you are not free to use the waiting/call time for yourself, that time is counted as hours worked. For example, if you must sit and wait for a delivery—and you cannot leave a specific location or do personal things, like you would on, say, a typical day off—that time must be paid.

For example, an employee who must stay on-call at his workplace, or nearby, and cannot use the time for his own purposes is working and must be paid. Meanwhile, an employee who doesn't have to be at any specific location but merely leave word where he can be reached is not working.

Common examples working while on-call include when (1) the employee is required to call a customer back within 10 minutes, (2) the employee must remain within a certain distance from the office during an on-call period, (3) the employee is given a company phone or computer and required to respond to calls and emails as they arrive.





What doesn't the FLSA cover?

# WHAT DOESN'T THE FLSA COVER?

While the FLSA sets minimum wage and overtime pay standards, there many things it does not regulate. For example, the FLSA does not require:

- (1) vacation, holiday, severance, or sick pay;
- (2) meal or rest breaks, holidays off, or vacations;
- (3) extra pay for weekend, night or holiday work;
- (4) pay raises or fringe benefits; or
- (5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

Also, the FLSA does not limit the number of hours per day or week that employees over age 16 can be required to work. And while some employers pay double time for certain hours worked (like federal holidays), that is not a legal requirement but instead—like many workplace arrangements—are just matters of agreement between an employer and its employees.



# Unpaid wages



152,000  
1,350,652  
25,000  
15,600

195,025  
1,452,600  
30,658

1,002,155

535,084  
48,521

702,015

326,900  
45,987

15,985  
258,962

50,859  
31,958

359,200  
45,104

# UNPAID WAGES

There's one more way to recoup unpaid wages: through law established by Florida courts, which provide a way to protect employees who might not otherwise be covered by the FLSA, or who are owed more than the FLSA requires they be paid.

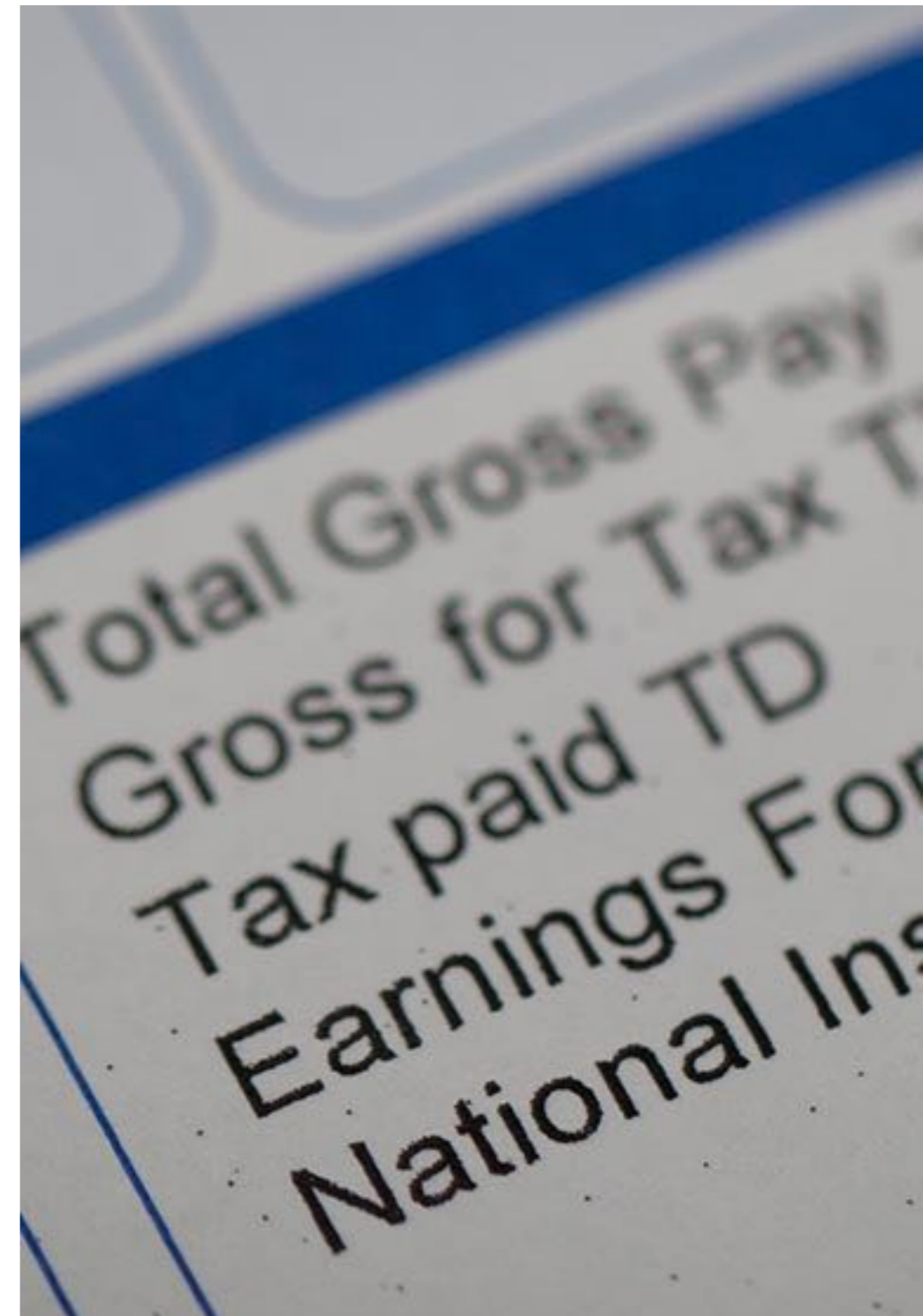
The idea behind an action for unpaid wages is that an employer has agreed to pay a worker in exchange for the worker's services. That might be at an hourly rate, commission or piece rate. Whatever the arrangement, the point is that the employee has provided a benefit to his employer, and a person getting that benefit would normally expect to pay for it.

There is no statute regarding the unpaid wages cause of action in Florida, the entitlement to get paid for your work is part of the common law based on the common sense principle that people deserve to get paid for the work they've completed.

A common occurrence of unpaid wages is when your employer promised you a commission and didn't pay you for it. In Florida, unpaid wages are recoverable because they are considered a breach of contract.

If you can show you've earned your commissions, but haven't received them, you may be eligible for both your wages and attorney's fees. Under Florida law, commissions have been earned when all of the significant work necessary for the commission to be earned is completed.

Florida law does not provide any sort of penalty for employers who fail to pay wages to their employees. The remedies are limited to recovering the wages at issue, as well as your attorney's fees and costs. The fee shifting aspect of these claims is often a factor in getting these cases resolved because prudent employers understand that they could become liable for substantially greater amounts in attorney's fees than the amount they actually failed to pay the employee.





# About the author



## ABOUT THE AUTHOR



Matthew K. Fenton has been a member of the Florida Bar since 1994 and has been practicing exclusively in matters arising from the employment relationship since 1997. He received his law degree from the University of Florida, with honors, in 1993, where he served on the Editorial Board of the University of Florida Law Review. Shortly after graduation, he served as law clerk to U.S. Magistrate Judge Mark A. Pizzo from 1995 to 1997. Mr. Fenton is a trial lawyer who has tried numerous employment law cases in both state and federal courts.

He has been selected by his peers for inclusion in every edition of the Best Lawyers in America since 2009 and has been repeatedly selected by his peers as a Florida Super Lawyer in Employment Law, which denotes status as one of the top 5 percent of Florida's lawyers. He has also been selected as a member of the Legal Elite in Employment Law by Florida Trend Magazine, representing approximately 2 percent of the active Florida bar members who practice in Florida. In 2016, Mr. Fenton was selected by Best Lawyers in America as the "Lawyer of the Year" for individuals in Tampa Employment Law.

Mr. Fenton has spoken on employment law topics and authored numerous publications on employment law, most recently contributing a chapter to the American Bar Association's practice guide "Litigating the Workplace Harassment Case." Mr. Fenton is a member of several voluntary bar organizations, including the Hillsborough County Bar Association where he is a past Co-Chair of the Labor and Employment Law Section.

Mr. Fenton is active in both the Florida and national chapters of National Employment Law Association, the Tampa Bay Trial Lawyers Association and the Florida Justice Association. Mr. Fenton has been admitted to practice in all Florida courts, in the United States District Court for the Middle District of Florida, the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals.

Mr. Fenton, a lifelong resident of Tampa, Florida, is proud to be married to a first generation Cuban-American, Rebeca Fenton, and father to two wonderful boys. When he is not fighting for employee rights, Mr. Fenton enjoys traveling with his family, collecting and listening to music from a broad variety of musical genres, spending time at the beach, and watching or attending Florida Gator football and basketball.



# About the firm

# ABOUT THE FIRM

At Wenzel Fenton Cabassa, P.A., we represent workers who have been wronged by their employers. We strive to get to know each client's unique circumstances, and we advise them on the best course of action. Our objective is to secure justice for our clients and to hold their employers accountable.

At our firm, our attorneys have decades of experience representing employees, so we are uniquely positioned to advise you on the best course of action, whether you've been fired or you're facing problems in your current job.

At Wenzel Fenton Cabassa, we know that good work doesn't always get rewarded. Our firm handles cases involving employment discrimination and harassment, whistle-blowing, civil rights, wrongful termination, the Family Medical Leave Act (FMLA), wage and overtime disputes, workers compensation issues, contract disputes, severance-related issues, EEOC mediations, government investigations, and violations of non-compete and trade secret agreements, among others.

We offer a free initial consultation, during which we will listen to your employment-related issues and discuss the steps we can take to resolve them.

**Disclaimer:** The facts and circumstances of your case may differ from the matters in which results have been provided. All results of cases handled by the lawyer/firm are not provided. The results provided are not necessarily representative of results obtained by all clients or others with the lawyer/firm. Every case is different, and each client's case must be evaluated and handled on its own merits.

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