



Out Of The Frying Pan, Into The Fire

By John Donovan (Atlanta)

As the economy shows no immediate sign of recovery, dealers continue to look for ways to reduce their expenses. One area that they usually focus on is labor costs. Most dealers have already trimmed their workforces by not replacing employees who have left, or by out-and-out layoffs or reductions-in-force. Some dealers have also revised or restructured employee pay plans to reflect the current economy.

But you should be aware that some of these “cost-saving” steps can have unintended consequences. In fact, the changes you think you are making to save money can wind up costing far more than anything you might have saved if an employee complains to the Department of Labor or to an attorney. Here are three areas where dealers can unwittingly find themselves jumping out of the frying pan and into the fire.

Not Paying Overtime When Due

Many dealers believe that they can achieve immediate labor cost reductions with one edict: “No more overtime.” Unfortunately, it’s not that simple. The law requires employers to pay for overtime if the employer “suffers or permits” the employee to work it. So even if your dealership has forbidden overtime, when an employee works more than 40 hours in a workweek, you must pay the employee for that time. You may discipline the employee for violating your rule, but the employee must still be paid.

Most dealerships have already cut back on staff and so the remaining employees are performing extra duties which may necessitate overtime, especially when closing the month. Furthermore, some employees who are used to receiving overtime get hit with a double whammy – their overtime hours are cut at the same time that gasoline and other living expenses have gone through the roof. They are likely to test the dealership and sneak in whatever overtime they can, regardless of the rules.

Conscientious employees faced with a “no overtime” rule may sometimes continue working overtime and simply not put it on their time cards. If a manager knows or has reason to believe that employees are shaving their hours or taking work home in order to get the job done, the employer will still be liable for the overtime.

Failing to Keep Up With Changing Job Duties

As a dealership’s workforce contracts, employees may be assigned to perform additional duties and different jobs during the week. But many of the overtime exemptions that dealerships use require that employees spend the *majority* of their work hours each week performing exempt work.

So, for example, if tech-trainees (exempt from overtime under the “mechanic” exemption), are assigned to help out in the lube lane or as courtesy van drivers or on the wash rack (none of which are exempt from overtime), the employees may no longer be spending the majority of their time in exempt work and may be entitled to overtime that week. Similarly, parts counter employees (exempt from overtime in most states) who are assigned to help out as parts drivers (not exempt from overtime) could lose their exemption if they drive more than half their time in any week.



Failing to Keep Up With the Impact of Business Conditions on Pay Plans

Many dealership employees are paid on an incentive system, normally based on some form of commission. When business is growing, employees are rewarded with an automatic increase in their compensation. But when business slows, the reverse is true and commissions shrink. Because these pay plans are “self-adjusting,” dealerships pay little attention to them. That can be problematic.

Dealerships often use the “commission-paid” exemption for employees such as lube techs and detailers. This is a valid overtime exemption only if the employees meet all of the requirements for the exemption. One requirement is that employees receive the *majority* of their compensation in the form of “commissions.” If employees are paid a salary plus a commission, and because business has slowed the commissions are now less than the salary, the employees are no longer exempt and are now entitled to overtime on their salary as well as their commissions.

Another requirement which is often overlooked is the requirement that commission-paid employees receive at least one and one-half times the federal minimum wage for every hour worked in an overtime week. When business is good and there is plenty of work to do, a commission pay plan makes good sense for these employees because it provides an incentive to work hard and protects the dealership from any overtime obligation.

But as business has slowed there may not be enough work to keep them fully employed. Therefore, if detailers or lube techs flag their time and work 48 clock-hours in a week, they must be paid at least \$6.55 x 1.5 x 48 hours or \$452.08, regardless of the number of hours they flag. If their flagged hours fall below that amount, the dealership must supplement their wages to bring them up to the required time and one-half or the employees will be entitled to overtime.

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Our Recommendations

These are difficult times, and dealerships should always be looking for ways to cut costs. But you must also make sure you comply with the law and do not create a greater liability for the dealership. We recommend that all dealerships consider the following. Some may seem small, but they can add up:

1. Reduce unnecessary overtime by checking employees' timecards to make sure they are taking the full 30 or 60 minutes for lunch. Cutting lunch short by only 15 minutes a day will result in 1 1/4 hours at overtime rates each week!
2. Do not "round" start and stop times. A sharp employee can pick up an extra hour or so a week by simply punching in a few minutes early and out a few minutes late and allowing you to round the time up.
3. Make sure employees do not punch in immediately upon their arrival at work, and then go hang up their coat, go to the bathroom and get their coffee. All of these things should be done before the employee punches in.

4. If your pay week runs Sunday through Saturday, check employees' time cards on Thursday. If it looks like someone might run into overtime by Friday evening, you can tell the employee to come in an hour late on Friday morning. This will help to reduce or eliminate the overtime.
5. Do not try to outlaw *all* overtime. Sometimes it makes good business sense to spend a few minutes completing a project in the evening rather than to delay starting it at all until the following morning. If you have a strict no-overtime rule, you can expect employees to stop work about fifteen minutes before quitting time and do nothing but get ready to punch out.
6. Closely monitor the amount of overtime each employee works each week and require that any employee who feels overtime is necessary bring the matter to the manager's attention *before* the time is worked.
7. Cross-train employees in some of the simpler departmental tasks so that they can take up some of the slack during periods of the month when other employees are particularly busy.
8. Remember that, under the federal law, overtime is due only after the employee has actually worked more than 40 hours. Holidays, vacation, jury duty, etc, even if paid, do not count as "hours worked."
9. If lube techs or detailers do not have enough work to do to meet the requirements of the "commission-paid" exemption, put them on an hourly rate with overtime. Then simply control the amount of overtime they work by careful scheduling.
10. If you have employees who are exempt from overtime because they are "commission-paid" employees, make sure that your managers are checking to make sure that they are still receiving the majority of their compensation in the form of commissions and that they are receiving at least \$9.83 for each hour they work in an overtime week.
11. Do not allow employees whose hours have been cut to perform other duties for the dealership in order to earn "extra" money. A dealer must count all hours the employee works each week when calculating overtime and must pay overtime on *all* compensation the employee receives.

A final caution: this article focuses on the requirements of the federal wage-hour law. Many states have laws which impose additional requirements on employers. Be sure to consult a competent attorney familiar with both state and federal law before taking any action based on this article.

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Once again Fisher & Phillips LLP is delighted to host a Kickoff Reception during the 2009 National Automobile Dealers Association National Conference in New Orleans. We invite all auto dealers attending the conference to join us at Pat O'Brien's on Sunday, January 25, 2009. The festivities will begin at 5:30 p.m. and end at 8:30 p.m. Join your colleagues for an evening of relaxed fun, beverages and food. Please watch for additional information from Fisher & Phillips for details about the reception.

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