

DON'T BE A WAGE & HOUR VICTIM: BEST PRACTICES TO KEEP YOUR COMPANY OUT OF LEGAL TROUBLE

Wage and hour claims, including class action lawsuits, continue to represent a major portion of employment-related litigation in California. Because wage and hour compliance can be a minefield for the unsuspecting employer, companies must be proactive in managing their exposure to these costly claims. Identified below are six key risk areas, common employer mistakes and recommended best practices.

1. Misclassifying Employees As Independent Contractors

An employer's misclassification of an employee as an independent contractor creates significant exposure to wage and hour claims (e.g., minimum wage, overtime, meal/rest periods, business expense reimbursement) and federal and state tax penalties. As state and federal governments struggle with soaring deficits, misclassification audits are gaining momentum as an untapped source of revenue. President Obama's 2010 budget assumes that the federal crackdown on independent contractor misclassifications will yield \$7 billion in revenue over the next 10 years.

Companies should act now in assessing the propriety of any workers classified as independent contractors, including reviewing the California Employment Development Department's Employment Determination Guide (www.edd.ca.gov).

2. Unpaid Overtime On Non-Discretionary Bonuses/Commissions

In many cases, employers are required to include non-discretionary bonuses and commissions in calculating a non-exempt employee's regular hourly rate for purposes of paying overtime. A bonus will be considered discretionary and, therefore, not part of the regular rate of pay if both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the earning period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payment regularly.

Any employer that pays bonuses and/or commissions to non-exempt employees should review its payroll processes to ensure the proper calculation of overtime.

3. Off-the-Clock Time

An employer is obligated to pay for all hours that it knew, or should have known, were worked by the employee. This includes pre- and post-shift work such as putting on protective clothing, walking to a work station, or working during computer boot-up time. In today's 24/7 world of virtual network access, employers must exercise caution in allowing non-exempt employees remote access to company e-mail and servers and in providing BlackBerry-type devices. Such around-the-clock access significantly increases the risk of an off-the-clock claim. Where such access is given, employers should have a user agreement which covers, among other things, the employee's obligation to accurately record all hours worked remotely. Managers should also be

trained regarding the importance of ensuring that non-exempt employees are recording all time spent working, including work performed after hours via remote access.

4. Meal/Rest Periods

California Labor Code section 226.7 is responsible for much of the explosion of wage and hour litigation. This provision, which became effective in October 2000, gave employees the right to one additional hour of pay for each day that an employer failed to comply with California's strict meal and rest period requirements. Among the mistakes employers make are: automatic 30-minute meal period deductions; providing less than 30 uninterrupted minutes; on-duty meal periods; requiring employees to stay on premises during a meal period; and failing to provide employees with the opportunity to take a duty-free rest period.

The California Supreme Court is reviewing these issues in the *Brinker* and *Brinkley* cases. Pending those decisions, meal and rest period claims continue to be a major source of litigation. To minimize exposure to these claims, employers should: (i) ensure that the applicable Wage Order is posted; (ii) implement detailed written meal/rest period policies that are distributed to employees; (iii) conduct periodic meal/

rest period training of employees and management; and (iv) audit employee timecards for meal period compliance.

5. Employee Misclassification

Employees are presumed to be non-exempt and eligible for overtime; it is the employer's affirmative burden to prove otherwise. Often the main issue in misclassification litigation is whether the employee spends more than 50% of the time performing exempt duties. This is a quantitative and qualitative analysis; job titles are not determinative.

To reduce exposure to these claims, employers should maintain detailed and accurate job descriptions that closely track the exemption requirements. In addition, employers should conduct periodic audits to confirm that exempt employees are indeed spending more than half of their time performing exempt work.

6. Failure To Reimburse For Business Expenses

All employees (exempt and non-exempt) are entitled to reimbursement for expenses or losses incurred within the course and scope of employment (e.g., mileage, cell phone, uniforms, tools, etc.). An employee cannot be required to pay for cash shortages or breakages, even if they are the result of the employee's negligence; discipline is the employer's recourse. Employers that issue a lump sum payment to cover business expenses (e.g., auto allowance) should conduct periodic audits to ensure that the employee's actual expenses are being fully covered.

Act Now

In light of the continued scrutiny of wage and hour compliance, it is critical that employers take action now and audit their payroll practices to anticipate and eliminate what, in many cases, can be significant monetary exposure.

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