

Lawyer Insights

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Top 10 Wage and Hour Issues That May Be Lurking Within Your Company

By Ryan M. Bates

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Wage and hour compliance continues to be challenging for even the most sophisticated companies. Multimillion-dollar settlements and verdicts are announced daily. Despite the notoriety around wage and hour lawsuits, most companies are unaware of a compliance issue until a lawsuit arrives on their doorsteps.

Don't get me wrong—compliance is difficult. And it has been made even more difficult with ever-changing laws, regulations, and guidance, particularly on the state and local levels. Modern technology has further complicated the analysis as the workplace continues to evolve.

Below are 10 wage and hour issues that may be unknowingly lurking within your company:

1. Manager Misclassification

For the last several years, manager misclassification suits have been all the rage, particularly in the retail industry. The typical allegation is something like this—the exempt manager spends a majority of their time not actually doing management-related tasks, but instead stocking shelves, providing customer service, working the register, etc.

These types of cases are popular with the plaintiff's bar because of the high potential for damages and the relative ease of obtaining conditional certification under the Fair Labor Standards Act. As a result, companies should closely examine the actual day-to-day duties of its managers classified under the exemption to ensure the exemption will withstand judicial scrutiny. Moreover, a company can take proactive measures—e.g., revising job description and/or restructuring the position—to stave off any potential claims.

2. Overusing the Administrative Exemption

While attending a client's onsite wage and hour audit by the Department of Labor, one of the first questions out of the investigator's mouth was: "Who here is classified under the Administrative exemption?" My immediate thought—this investigator knows what she's doing.

The administrative exemption is, in my opinion, the most misunderstood exemption. Perhaps this is a result of poor naming, as the exemption does not apply to purely "administrative" employees—i.e., secretaries, executive assistants, and the like.

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To qualify for the Administrative exemption, the employee's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and must involve "the exercise of discretion and independent judgment with respect to matters of significance." Courts have painstakingly dissected each word in the above definition and, in some instances, rejected use of the exemption when even a discrete part of the definition is not met.

The end point is this—if you classify employees under the Administrative exemption, you should seek legal counsel to be certain that use of the exemption is proper.

3. Pre- or Post-Shift Tasks

When hourly employees are performing tasks outside of their clocked-in hours, the company is a prime target for an "off the clock" claim. When this occurs on a wide-scale as a result of a company policy or practice, there is high potential for an "off the clock" class and/or collection action.

Common claims in this realm include donning and doffing employer-mandated attire, performing work during meal breaks, employees being required to remain "on call," or mandating tasks that slow employees' arrival or departure time (e.g., post-shift security screening).

4. Remotely Working 'Off the Clock'

This is related to #4, but worthy of its own category. Years ago, it was relatively easy for observant managers to recognize when an hourly employee was working "off the clock." The manager could easily see an employee coming in before his or her shift, staying late, or working through their lunch hour. Technology has changed that. In today's world, the tiny computer in our pockets, remote network access, and other technologies make it incredibly easy for hourly employees to work "off the clock."

We cannot be held liable for hourly employees working outside their schedule when we told them not to, right? It depends. Generally, employers are responsible when they "know or should have known" that an employee was working "off the clock." Did an hourly assistant send you an e-mail at 6 p.m. when she left work at 5 p.m.? Did an hourly employee causally mention that they finished the project "last night" but did not put down any hours? In these instances, a court may very well find that you "should have known" that the employee was working "off the clock."

While an hour here or there may seem inconsequential, the value of these claims can be significant—even on an individual basis—when multiplied out over several years at the employee's overtime rate. Moreover, these types of claims are difficult to dispose of before trial given the factual nature of the dispute.

5. Failing to Timely (and Properly) Pay a Final Paycheck

Nearly half of the states have laws that accelerate when an employee's last paycheck is due depending on whether the employee is fired or voluntarily quits. Failing to adhere to these requirements can open up a company to class claims associated with the late payment.

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Additionally, companies should be mindful of issues surrounding the manner of employees' final payment. If payment is issued in a non-standard fashion—e.g., a debit card or “pay card”—there may be related state law issues.

6. Supervisor Discouragement of Accurate Time Recording

No manager is foolish enough to discourage his/her employees from accurately recording their time, right? Wrong. It happens all the time—especially in the “do more with less” world in which we currently live.

So what can we do about it? Training and policies are important, but all the training and policies in the world will not prevent a rouge manager from discouraging accurate timekeeping. The key is to catch this issue before it snowballs out of control. The most important way to do this is ensuring that employees feel comfortable speaking out—whether directly to their HR representative, another manager, or the company hotline.

7. Failing to Factor Supplemental Compensation into Overtime Rate

It is common knowledge that, under federal law, hourly employees are entitled to time-and-a-half of their regular hourly rate for all overtime hours. Companies are often tripped up, however, when employees receive additional compensation that may alter their “regular rate,” which results in a higher-than-expected overtime rate.

This commonly affects commission-earning employees. If an employee makes \$10/hour plus commissions, then the employee's overtime rate must factor in those commissions. In other words, assuming the employee earned a commission that particular week, his/her overtime rate will be more than \$15/hour.

This issue also comes into play with bonuses. Whether a bonus should be included into an employee's “regular rate” depends on whether it is discretionary or non-discretionary. If the bonus is non-discretionary—i.e., effectively “promised” to the employee—then it must be included in the regular rate. Completely discretionary or spontaneous bonuses (i.e., “you did a good job this week, here's a \$100 bonus”) have no effect on the regular rate.

Other forms of supplemental compensation, such as shift differentials and meal allowances, may also affect an employee's regular rate.

8. Forgetting About Reporting Pay

Companies with cyclical demand will, at times, force hourly employees to leave early because of a lesser-than-expected workload. For example, if a retail store has very few shoppers because of a snowstorm, the store may decide to “cut” half of its staff, shorting them of the opportunity to work their full shift. While this is permissible under federal law, several states—e.g., California, D.C., Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island—have reporting pay statutes that requires a certain amount of compensation for employees who show up for work and are sent home early.

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9. Misclassification of Computer Professionals

Everyone in your IT department can automatically be classified as exempt under the Computer Professional exemption, right? Wrong. Simply because an individual “works in IT” does not necessarily mean that he/she qualifies for the Computer Professional exemption. In fact, many employees in a typical IT department may not qualify for the exemption.

Without getting hyper-technical, the FLSA draws a line—albeit, a fuzzy line— between IT employees who design, develop, analyze, and test computer systems and programs (e.g., computer analysts, programmers, engineers, etc.) and those who manufacture, repair, and troubleshoot hardware and software issues (i.e., the “my computer is broken, come fix it” person).

It is important to recognize this line and understand which side of the street your IT professional falls on.

10. Forgetting About State Wage and Hour Exemptions

Some companies exclusively focus on FLSA compliance while neglecting to consider state law. There are often appreciable difference between federal and state wage and hour law that must be considered.

Outside of minimum wage requirements, the most meaningful difference lie in the overtime exemptions. Currently, there are about 20 states whose exemption rules differ from federal rules. These differences range from relatively minor to significant. Thus, to be compliant, companies must ensure that their employees meet both the federal and state exemption.

One of the more widely-known state variations is California’s requirement that exempt employees spend at least 50% of their time on exempt duties (whereas federal law utilizes a more employer-friendly, “primary duty” test). This subtle language difference has broad implications in the ultimate conclusion as to whether the employee is properly classified under state law.

Employers should also be aware that exemptions existing under federal law may not exist under state law. For example, several states do not recognize the outside sales, retail sales (or “inside sales”), computer professional, and highly-compensated employee exemptions.

Companies should also keep in mind that the standard of proof can be different under state law. For example, in Alaska, the employer has the burden to prove that an overtime exemption applies “beyond a reasonable doubt.”

Conclusion

As the saying goes, “you don’t know what you don’t know.” The best way to identify these, and other, potential wage and hour issues is with a comprehensive wage and hour audit. With good counsel, these issues can be identified and resolved before the matter escalates into a multimillion-dollar headache.

Ryan M. Bates is a partner in the labor and employment practice group in the firm’s Washington, DC office. His practice spans all aspects of employment law. He has distinguished himself as a nationwide litigator

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handling complex employment litigation, including class actions, collective actions, and “bet the company” litigation. Ryan routinely counsels nationwide clients on difficult compliance issues. He can be reached at +1 202 955 1596 or rbates@HuntonAK.com.