Some Key Points for Wage/Hour Compliance

Insights
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Whether the economy is still declining or on the rebound, one thing is clear: the storm of wage & hour litigation continues to buffet employers, an increasing trend that began long before the current recession and plague of unemployment in California. Two key historical facts have contributed significantly to the rise of such litigation in California beginning this decade.

First, the restoration of daily overtime in January, 2000, and subsequent legislation adding numerous penalties and providing further incentives for attorneys to bring wage claims. Second, the current recession which has resulted in increased claims filed by unemployed individuals seeking money.

The Main Trouble Spots
Your best bet is to identify potential problem areas take proactive measures to achieve and maintain compliance on wage & hour matters. The principal areas of concern should be the following:

Training. With turnover and hiring in flux, new employees assigned to duties requiring expertise in payroll and wage & hour compliance expertise must be provided with adequate training. Do not assume that managers or administrators, even those with some background in wage & hour matters, are up to speed.

Meal Period Compliance. A significant number of claims involve meal period compliance. Employees in California are entitled to one uninterrupted 30-minute off-duty meal period if they are working more than 5 hours, and a second meal period if they work more than 10 hours on any work day. The starting and stopping times of these meal periods must be recorded.

In addition, employers must pay an additional premium of one hour of pay if the meals are not provided as required by law. The issue of whether an employer has to assure that meal periods are taken, or merely make them available, is on review by the California Supreme Court. But at the very least you cannot interfere with an employee's right to enjoy a meal period.

Strict conditions also apply to implementing valid waivers in specific situations. Employers should schedule specific times for meal periods and require all employees to take and record their meal periods or face discipline for non-compliance. Set out meal-period policies in the employee handbook, with procedures for obtaining an employee's acknowledgment that the policy was

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handbook, with procedures for obtaining an employee's acknowledgment that the policy was received and understood. Merely posting the applicable Wage Order in areas frequented by employees will *not* suffice to show that meal periods were actually provided.

Rest Period Compliance*.* An employee is entitled to a rest period of at least 10 minutes "net rest" for every 4 hours of work ("or major fraction thereof"), which should be permitted to be taken, if "practicable," in the middle of this work period. These rest periods need not be recorded and are paid working time. The no-documentation requirement may seem to lighten the burden on employers, but disputes as to whether a rest period was permitted on specific occasions often arise.

Thus, periodic signed acknowledgments should be obtained from employees confirming that breaks have been provided. The facts of each case become critical. For example, employees working with tight schedules or in remote locations without relief may bring a rest-period claim.

Overtime Compensation*.* Many wage & hour lawsuits involve alleged unpaid overtime. Improper documentation of hours worked (including unpaid on-duty meal periods that are recorded as "off duty") often becomes the basis for claims for unpaid overtime. Independent contractors and salaried exempt employees who claim they were misclassified generally have not kept time records, making it more difficult to defend overtime claims. Some claims involve bad arithmetic or oversights. Key areas of concern include the following:

- Bonus compensation: most non-discretionary production bonuses should be included in the employee's regular rate for overtime compensation purposes.
- Work performed by an employee for "joint employers": work for different corporate entities or affiliated enterprises with different owners, must be amalgamated for overtime purposes. Whether two entities are "joint employers" is a mixed issue of fact and law which is determined on a case-by-case basis.
- Exemptions: effective January 1, 2009, the minimum compensation for highly skilled computer employees exempt from overtime requirements increased from $36.00 to $37.94 per hour, with the minimum annual of salary of $79,050. If employees otherwise qualifying for this exemption are earning less than this threshold, their compensation must be increased to preserve the exemption.

Other overtime claims have resulted from improper deductions from an exempt employee's salary, or the alleged failure of employees to principally perform duties that qualify for an exemption. Periodic performance reviews and self-audits with support from legal counsel is recommended for exempt positions.

Hours Worked*.* You should carefully monitor how employees' time is being recorded for on-duty standby, travel, training events, and employer gatherings including employer-furnished meals. In California, "hours worked" is defined as time when employees are "suffered or permitted to work" or under the control of the employer. Strict policies should be implemented prohibiting "off the clock" work, and work performed outside the employer's premises should be authorized by the

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employer and timely recorded as with all other hours worked for the week. And of course documentation should be closely monitored and authenticated by employees each pay period.

Other Pay Practices. We see many claims involving technical compliance issues. For example, employers who fail to pay wages in a timely manner may be subject to penalties. Different standards and types of penalties apply depending on whether the payment was late for a regular pay period or upon termination of employment. In addition to making timely payment, if employees are not provided an itemized statement required by law, additional penalties could result. Deductions from earned wages are permitted only in special circumstances and generally require a written authorization signed by the employee. All accrued but unused vacation must be paid with final wages upon termination.

Informal Resolution. A number of claims arise as a direct result of an employer's improper or incomplete resolution of incorrect payroll practices. As evident from case law and recent legislation, a release of liability signed by an employee may not be proper or enforceable in all situations.

The best way to catch and correct these mistakes is through a thorough internal audit, not a lawsuit. We can help with such an audit, as well as in resolving any claims and achieving full compliance going forward.

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