

THE EXPLOSION OF OVERTIME CLAIMS (PART 2)

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In our last issue we looked at some of the most important timekeeping problems that employers should be aware of, in order to keep from being engulfed in the virtual tsunami of overtime claims being filed in recent years.

In this issue we'll explore some other problem areas and offer some specific advice.

NEGLIGENT SUPERVISION AND MANAGEMENT POLICIES

Poor supervisory habits magnify the risk of liability for overtime claims. Such habits lead to errors that are repeated each day and continue month after month, resulting in substantial cumulative liability. Here are a few examples:

- Failure to monitor, control, and document overtime worked by subordinates creates a wasteful environment. The supervisor's failure to monitor timekeeping or to require prior authorization before overtime is worked may lead to disputes regarding whether overtime was worked or paid properly.
- Issuing employees keys or codes to gain access to the work offices or permitting them to take work home after hours or during weekends. This privilege can be abused and may result in exaggerated overtime claims which are difficult to refute because employees were allegedly working – but unsupervised and not observed. In such cases, you could find yourself paying for overtime that was not actually worked as alleged.

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- Poor management training and control of work performed by payroll clerks and lower-level supervisors, leading to overtime errors. This could include not calculating overtime properly, such as factoring some categories of bonus compensation into the regular rate calculation; incorrectly calculating the regular rate for salaried non-exempt employees; or failing to use a weighted average method of calculating overtime for work weeks when employees have been working under more than one hourly rate of pay.

To make sure supervisors are doing their jobs, institute internal procedures such as periodic audits by upper management, accounting, or human resource professionals to ensure that problems are caught before they lead to huge cumulative liability.

INTENTIONAL FRAUD

Stealing overtime by fabricating timekeeping is fraud and a crime. Employers with loose controls but having the most philanthropic and supportive programs for employees can be easy victims. There are other enticements to claiming unpaid overtime. In California, unpaid overtime draws interest at the rate of 10% per annum, which is a better rate of return than many financial institutions will yield.

The frequent publication of successful overtime claims or settlements, coupled with many employee advocates inciting spurious claims with promises of big payoffs, make the overtime cultivation industry a big business. Attracted by the lure of a cash award, employees may begin to “farm” overtime from the onset of employment, with tactics such as

- marking down unworked overtime;
- engaging in schemes such as punching other employees’ timecards;
- deliberately failing to punch out their own timecard, then requesting that a supervisor rely on their inflated account of hours worked when the time card is corrected by the supervisor on a later date; or
- making electronic modifications to previously documented time.

Some employees deliberately exploit positions that require honesty, including accurate timekeeping for work performed without close supervision. And there are employers who do not have good systems to monitor the employees' practices to confirm their honesty. Timekeeping professionals typically have technology with fraud detection or prevention systems, although some employers don't like to pay the additional cost of such safeguards. You should consider whether losses could be offset by expending the necessary capital to obtain technology to detect and curtail employees who are engaged in timekeeping and overtime fraud.

Sometimes when precautions are not taken, fraud can be detected later. It's a fairly common occurrence during wage and hour litigation that an employee's dishonest timekeeping activities are discovered for the first time. These activities, if proved convincingly, could result in severe offsets against claimed wages. But it's better to avoid overtime claims in the first place than to defend them.

OUR ADVICE

Employers should take the initiative to anticipate, prevent, and challenge overtime claims, if necessary. It makes sense to take specific actions to safeguard against losses due to overtime claims caused by both negligent and intentional practices.

Conduct periodic management training, check timekeeping at regular intervals (daily, weekly, pay period), build systems that encourage scrutiny and authentication, and even hire private detectives or forensic experts, if necessary, when sophisticated patterns of misconduct are detected. This is especially important if you discover schemes where supervisors or higher level managers are complicit. When such steps are taken, and employees can see your vigilance, the word gets out.