



Wage-Hour Pitfalls Rise In Fallen Economy

Insights

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Employees are working longer and harder to ensure that they keep the jobs they have. With unemployment hovering around 9.5% nationally and up to 13% in states such as Michigan, employees are doing what they can to stand out and avoid being cut in unfortunate, but sometimes necessary layoffs.

After a reduction in force, the remaining employees' workload often increases to sustain production of employees that were let go. This increased workload, along with the pressure to keep their current job, leads some well-intentioned employees to arrive earlier, stay later, work through lunch, or take work home – regardless of whether they are being compensated. One manager put it in terms of survival, explaining that employees are working longer, "...trying to ensure that they and their jobs will survive."

For employers, employees who work harder and longer can only be a good thing, right? Perhaps, but proceed with caution. Yes, it is a good thing that employees are stepping forward to take on more responsibility and are willing to work longer hours to ensure that their positions are insulated from looming layoffs. But the Fair Labor Standards Act (FLSA) still applies, recession or no recession. Here are some pitfalls to the seemingly good behavior of well-intentioned, recession-wary employees that may result in a future FLSA claim.

Employees Are Not Volunteers

Sorry, but employees cannot volunteer to do their jobs; employees must be paid. There is no such thing as "voluntary unpaid overtime" or "donated" time under the FLSA. Expecting or allowing employees to put in unrecorded work time, or to work "off the clock," is asking for a lawsuit. It is simply impossible under the FLSA for an employee to waive the right to receive at least minimum wage and applicable overtime pay for all hours worked. Any agreement, formal or informal, to the contrary (other than a wage-claim settlement supervised and approved by the Department of Labor) is void and unenforceable. Additionally, as some employers implement furloughs, cutting one day a month or turning a five-day work week into a four-day work week, be cautious that furloughed employees are not working off the clock to catch up or get ahead.

Simply put, you must ensure that all non-exempt employees properly record all time worked and that they are paid for it. This includes time spent working before and after designated work hours.

And watch out for non-exempt employees who work through an unpaid lunch break or who take work home to "get caught up" or to "get ahead." Be cautious of any employee arriving early or staying late "off the clock" even if to perform daily minutia. Although their initiative should be praised, make it clear that no extra work should be done that is not properly accounted. Managers should be trained not to "turn a blind eye" to employees working off the clock, no matter how good their intentions.

Presenteeism

"Presenteeism" is the habit of staying at work unproductively so that it looks like an employee is working hard. The amount of "presenteeism" increases in a recession when employees feel "face time" will only help as reductions are made. For exempt employees, it's a non-issue, but for non-exempt employees, this time must also be compensated.

When employees are idle during their regular workday because of interruptions or lags beyond their control, the time spent waiting should be counted as working time if it is unpredictable and of short duration so that the employees are unable to use the time as their own. Be aware of employees who look busy but aren't; if necessary, send them home. To justify not paying employees, they must be relieved from duty for a specified period of time, long enough to effectively use such time for their own purposes.

Time spent waiting to report back for duty, while completely relieved, is not considered working time. For example, an hourly-paid hostess working at a restaurant idly waiting for customers to arrive must be compensated. A hostess who is sent home and relieved of her duties prior to the end of her scheduled shift because business is slow would not have to be compensated.

Classifications

One of the biggest FLSA mistakes is classifying an employee as exempt, making the employee ineligible for overtime, when the employee is really non-exempt. Minimum wage and overtime rules apply to non-exempt employees. Exempt employees are not entitled to overtime pay – but not all salaried employees are exempt. To be exempt an employee must be salaried *and* meet the requirements of a specific exempt classification.

The most common exemptions are available for executive, administrative, professional, computer and outside-sales employees. Of course, simply labeling an employee an "administrator" or an "executive" does not create an exemption. For FLSA purposes, it does not matter what an employee is called, rather, the FLSA is concerned with what the employee does.

The employee must meet all the specific criteria outlined by the FLSA. For example, in order for an employee to be exempt under the administrative-employee exemption, 1) the employee's *primary duty* must be to perform office or nonmanual work related to management or general business operations of the employer and the employer's customers *and* 2) he or she must exercise discretion and independent judgment with respect to matters of significance. Each exemption has its own fact-specific criteria

specific criteria.

Properly classifying employees is half the battle of all FLSA issues. Be vigilant about conducting classification audits and understand the FLSA's criteria in detail. Also be aware of employees' classifications when new positions are added or as job titles and duties are shuffled because of mergers or lay-offs.

The Bottom Line

Employees may be more willing to work longer hours in these tough economic times, but employers must be careful to safeguard against an FLSA claim in the future, no matter how good intentioned the employee. Educating employees and managers of your expectations regarding hours and timekeeping will help to create an FLSA compliant culture and will help prevent an FLSA claim in the future.