



# **Top 5 Wage And Hour Risks To Avoid As Businesses Reopen**

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Wage and hour compliance is never easy for employers, but the COVID-19 pandemic has further complicated compliance efforts for almost every business in the country. Whether forcing a shift to remote work, causing reduced operations, or bringing about a complete shutdown, the coronavirus crisis has pushed many employers to the brink.

But as the nation endeavors to get back to business, the next challenge begins: Your wage and hour compliance efforts will be under scrutiny like never before, and the impact of any mistakes will be magnified. Here are the five biggest wage and hour mistakes employers should avoid in these unprecedented times.

## **1. Misclassifying Employees as Independent Contractors**

It might be tempting to reengage certain individuals as independent contractors or to simply bring on a consultant to replace an employee who has been laid off or furloughed. That approach can be very risky. Even where an individual agrees to be classified as an independent contractor, receives a 1099, or even performs services through a separate limited liability company, they might not be properly classified as an independent contractor.

Under the Fair Labor Standards Act, courts look at the economic realities of a relationship to determine whether an employment relationship exists. Certain states rely on alternative and stricter tests, such as the so-called ABC test in California, New Jersey and elsewhere.

While there can be distinctions for determining whether a given worker is an independent contractor under various federal and state laws, one key consideration in all tests is the employer's level of control. Before making the decision to engage a contractor or rehire someone into a consultant role, employers should be keenly familiar with the relevant law in their jurisdictions.

Too much control over an individual's work may foreclose independent contractor status.

Misclassification issues can be costly, not only exposing employers to liability for unpaid overtime and benefits but also to penalties and tax liabilities.

## **2. Erroneously Treating Employees as Exempt**

The FLSA requires nonexempt employees to be paid a minimum wage and to be paid overtime of at least time and a half their regular rate of pay for all hours worked over 40 hours in a workweek. There are exemptions to these requirements, which generally require an employer to meet a salary basis test (not less than \$684 per week in 2020) and certain job duties tests (for administrative, executive and professional exemptions, among others).

Besides the federal exemptions, employers need to be mindful of state exemptions — which do not always mirror their federal counterparts. In New York, for example, the salary thresholds for administrative and executive exemptions are higher and vary by location, and the duties test exemptions also have slight differences.

With remote work, layoffs, furloughs, salary reductions and other workplace changes resulting from the pandemic, exempt employees may be tasked with covering the work of nonexempt employees. If the nonexempt work subsumes their responsibilities over a given period of time, an employee's actual job duties may no longer match their intended exemption.

That is, of course, a problem, and employers in such situations could be on the hook for unpaid overtime, not to mention liquidated damages, attorney fees and costs. As companies strive to return to the new normal, employers should avoid tying salary adjustments to hours worked to avoid these challenges.

### **3. Miscalculating or Neglecting to Pay Wages**

An act as simple as trying to pay employees their wages can lead to legal challenges in today's business environment. It's easy to commit a miscalculation when determining the regular rate for overtime, and certain COVID-19-specific scenarios increase the likelihood that employers can commit such a misstep.

The regular rate takes into account all remuneration earned from employment, subject to specific exclusions set forth in the overtime statute. Mistakenly excluding certain items from an employee's regular rate calculation can result in costly litigation. When employers provide hazard pay, hero pay or discretionary bonuses to deserving workers, it can raise regular rate issues depending on whether the extra payment is correctly classified as discretionary or necessitates a rate adjustment for overtime purposes.

Another problem area when it comes to wage payments relates to final payments owed to departing or terminated employees. For employers who have had to make (or may still need to make) the difficult decision of laying off employees, they should make sure to pay all wages in a timely manner.

In most states, wages are due no later than the next regular payday for the pay period worked. However, some states like California and Oregon enforce a different timing requirement depending on the reason for the separation. Failure to pay wages when due can result in stiff penalties.

on the reason for the separation. Failure to pay wages when due can result in civil penalties, including liquidated damages and in some cases criminal penalties.

#### **4. Failing to Properly Pay for Cancelled or Intermittent Work**

Employers need to be careful when requesting an employee to report to work and then sending the employee home for whatever reason — say, miscommunication, a lack of work or a coworker testing positive for COVID-19. A handful of states require employers to pay employees a minimum amount simply for reporting to work.

In New Jersey, for example, employers are required to pay employees at least an hour at the applicable wage rate for reporting to work, with some exceptions. New York and California are among a few other states that have specific reporting pay requirements.

Employers also should be mindful about whether they are required to pay anything extra to employees who work multiple shifts or extended hours in a workday. A notable example is New York, which requires employers to pay employees an additional hour at the minimum wage rate in any day an employee works a split shift, a spread of hours that exceeds 10 hours, or both.

Likewise, employers that operate on-call shifts need to be conscientious about exerting too much control over on-call employees such as nurses and repair and retail workers. Under federal law and most states' laws, on-call time is usually not compensable, but can become compensable depending on the employee's on-call conditions. The facts of each scenario matter, but if employees are restricted such that they cannot use the time for their own benefit, then the time generally must be counted as hours worked for both minimum wage and overtime purposes.

Lastly, employers should know when to pay employees who might be waiting for work in other scenarios. The ongoing pandemic in particular has resulted in increased remote work, with many nonexempt employees working sporadically each day.

Under federal law, the analysis is fact-sensitive and focuses on whether the employee was engaged to wait or waiting to be engaged. The former is compensable, and factors to consider can include whether an employee is unable to use the time effectively for her own purposes or waiting is an integral part of the job. Employers faced with this issue also need to review applicable state laws, which may be more restrictive.

#### **5. Improperly Handling Unauthorized Work**

Finally, with the COVID-19 crisis thrusting so many businesses into remote work configurations, it is all the more challenging to keep tabs on nonexempt employees to ensure they are properly paid. As a general matter, employers are responsible for compensating employees for all hours worked, even if work is not approved or contrary to a company's strict policies forbidding unscheduled work or overtime.

or overtime.

To avoid off-the-clock claims, it is essential for employers to enforce strict time-tracking measures through clearly written company policies that should be consistently enforced. And of course, the sudden advent of remote work makes it incumbent upon employers to establish policies to clearly identify time worked to avoid excessive overtime or off-the-clock claims.

For example, the policies should instruct workers to contemporaneously clock in and out when they begin and end their days, as well as for their meal and rest breaks (paid or not). The policies should remind employees not to work any unscheduled hours unless it is in accordance with written policies (e.g., with manager approval).

Careful thought should be given to what systems (email, intranet, etc.) the employee can access outside of their scheduled hours. Also, the policies should direct employees to include all time they work in their time records, even if the time was unauthorized, so it can be included as hours worked for payroll purposes; it is important to understand that employers are obliged to pay for all time worked, even if not approved in advance, although the employee can be disciplined for violating the company's policies if all work hours and overtime require prior approval.

## **Conclusion**

Wage and hour issues can be daunting in the most normal of times, and the challenges have only increased in 2020. It is important to recognize that the burden of proof almost always rests with the employer to establish compliance with federal and state wage laws.

Even comparatively minor mistakes can result in costly class and collective actions with high-stakes consequences. Because the challenges of the COVID-19 crisis do not absolve employers from wage and hour compliance, you need to stay current with federal and state laws, monitor compliance, and keep these five challenges front of mind.

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