The Potential Perils Of "Managing Through The Payroll"

Insights
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Management's already-daunting, time-consuming responsibilities are further complicated by the need to motivate employees to do desirable things and to deter them from doing unwanted things. It is therefore understandable that employers might look for indirect, "set it and forget it" ways to accomplish this that do not involve the actual, day-by-day supervision of a worker's conduct.

Some employers attempt to achieve this via a carrot-and/or-stick approach to employee compensation. Such systems might produce suitable outcomes in the right circumstances, but management must also ensure that they do not create potential problems under the federal Fair Labor Standards Act or other wage laws.

Carrots And Overtime Wages

For instance, an employer might pay incentives to non-exempt employees to induce them to meet attendance, punctuality, or safety standards or to engage in or to avoid other conduct that management wants to promote or discourage. Of course, wage-hour laws are unlikely to preclude these policies in or of themselves.

However, such incentive payments can implicate the FLSA (and/or other laws) by increasing the amount of overtime compensation due to employees who receive them. This could be the case if (as we have summarized elsewhere) such a sum must be taken into account in calculating a non-exempt recipient's "regular rate" of pay underlying the FLSA-required wages due for hours worked over 40 in a workweek. An employer that fails to do this might later find that its "carrot" has created claims and liability.

Sticks That Can Backfire

At the other end of the spectrum is a practically-endless variety of what amounts to monetary penalties or other directly or indirectly pay-reducing sanctions. These are typically imposed in response to employee errors or misconduct or due to a worker's failing to do what management wants done.

As an illustration, assume that an employer wants to ensure that non-exempt employees record the exact times at which they start and stop work each workday. However, some employees fail to do so on about 20% of the workdays. Supervisors say that they are too busy to monitor this. So management adopts a rule that a worker who does not punch-in and punch-out each workday will be fined $50 for the first infraction. For subsequent violations, the employer will assume that the employee performed no work on each affected workday.

If the fine directly or indirectly reduces an employee's pay below the legally-required minimum wage or overtime compensation, then it likely violates the FLSA (and/or similar requirements under other applicable laws). Moreover, another law might prohibit imposing such a penalty in *any* amount. And if ignoring an employee's worktime for one or more workdays causes this employer to pay the worker less than the FLSA or some other law requires, that too will almost certainly result in liability.

Of course, this is just one example among many that could present similar risks. Other illustrations might include policies relating to lost, damaged, or unreturned tools, equipment, or uniforms; mistakes or oversights in performing one's work; or cash or merchandise shortages.

In addition, these measures could imperil the status of one or more employees treated as being *exempt* by reducing or otherwise impermissibly affecting the compensation necessary to sustain the exemption relied upon.

The Bottom Line

Employers should think long and hard about whether, how, and to what extent to use compensation-based inducements, disincentives, and punishments as substitutes for more-direct means of managing employee conduct.

For one thing, properly administering lawful policies and practices of these kinds might necessitate investments of effort and resources that are different from – but comparable to – those that would be entailed in ongoing, first-line oversight and supervision, non-monetary discipline, and so on. Furthermore, it could be that the first-hand supervision of employees will be more effective in the long run.

In any event, such an evaluation should include an assessment of the prospects for legal risk that "managing through the payroll" might represent.