



"Lawsuits -- I Get It! But What Should We DO?"

Insights

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"Wage-hour lawsuits are booming," trumpets one recent report after another, and this is certainly true. The risk of high-exposure wage claims against an employer is greater than ever.

But worrying over scary headlines accomplishes little in itself. Instead, management's pressing agenda-item should be to focus upon compliance *right now*. The place to start is by evaluating where the employer's pay practices stand.

Every employer should know (or should quickly find out) the answers to questions like these:

Are We Paying Every Non-Exempt Employee At Least The Minimum Wage?

The current federal Fair Labor Standards Act rate is \$7.25 an hour. However, a number of states and other jurisdictions require a higher rate, some of which just became effective in the new year.

Are We Paying Every Non-Exempt Employee The Required Overtime Wages?

Relevant questions include, for example, whether all overtime hours are being both identified as such and lawfully compensated (such as work done at different locations or in different jobs, so-called "comp time" hours, and so on), and whether bonuses, commissions, on-call pay, shift differentials, incentives, and many other kinds of payments are being properly included in computing overtime wages.

Are Any Deductions Unlawfully Cutting Into The Minimum Wage Or Overtime Compensation?

Management should evaluate whether it is making any pay deductions that unlawfully reduce a non-exempt employee's pay to below the required minimum wages or overtime compensation. As illustrations, this might include the cost of required uniforms; the value of lost or damaged tools, equipment, or devices; or the dollar amount of cash or inventory shortages.

Are Our Non-Exempt Employees Accurately Recording All Their Worktime?

Among other things, management should be certain that it has identified all activities qualifying as compensable worktime. The employer should also ensure that it has in place a reliable, well-understood, fully functioning, and enforced system that is accurately capturing and preserving all

understood, fully-functioning, and enforced system that is accurately capturing and preserving all hours worked. For instance, are employees recording work done outside of "official" shift times or schedules, compensable time spent in training or in meetings, work done at home, *etc.*? Does anyone periodically check to see whether time records appear to be accurate?

Are We Prepared To Prove That Each Employee Treated As Exempt Actually Meets Each Exemption Requirement?

In order to evaluate this, management must be familiar with the often-detailed criteria defining who is and is not properly treated as exempt. It should also recognize that the laws of other jurisdictions might not provide for the same exemptions the FLSA does or might impose different, more-limited exemption rules. As we have cautioned before, on-line "advisors" and checklists are of only limited usefulness in this regard.

Are We Following All Child-Labor Restrictions?

Generally speaking, the FLSA age minimum for many non-agricultural occupations is 16, but the minimum rises to 18 for occupations declared to be "hazardous". Persons 14 and 15 years old may be employed only in limited occupations and usually only within explicit hours-worked and times-of-day restrictions. Again, other jurisdictions might impose different and far-more-restrictive limitations and prohibitions.

Do Workers We Consider To Be Non-Employees Really Fit That Status?

Erroneously treating a worker as being an independent-contractor or some other kind of non-employee (that is, as not being subject to any wage-hour requirements) is one of the hottest sources of wage-hour claims.

Are We Following Applicable State and Local Wage Requirements?

In addition to possible differences we have already mentioned, other applicable laws might well require things that the FLSA does not, such as daily overtime; minimum pay for reporting to work; split-shift premiums; and many other things too numerous to mention.

The Bottom Line

These questions might at first seem to be straightforward and uncomplicated. Instead, the truth is that often the answers are by no means simple, unambiguous, or clear-cut. And knowing the current state-of-affairs is only the beginning, of course.

If management identifies matters that should be addressed, typically there are different ways to approach what to do and how to do it. But ignoring compliance questions, or doing nothing to find out whether there are any, is a perilous course in today's wage-hour environment.

