

Guest Perspective

Employee wage laws present minefield to small businesses

AS EMPLOYERS gear up for a new tax year, there are many issues to consider with regard to employee wages. Wage and hour violations are one of the more prevalent and costly mistakes an employer can make.

While the federal Fair Labor Standards provides that all employees must be paid overtime (time-and-one-half the average hourly rate for any hours worked beyond 40 in a seven-day work-week) and receive minimum wage (\$5.85 per hour), a host of problems present themselves with these simple concepts. Some of the more problematic areas employers face include:

Salaried-exempt employees: While many employers believe paying an employee a salary excuses them from paying that employee overtime, this is not the case. Unless an employee fits a specific white-collar exemption or one of the very few exemptions allowed under the FLSA, an employee must be paid time-and-a-half for overtime.

There are three white-collar exemptions. The executive exemption is reserved for employees who make more than \$455 per week and whose primary duty consists of managing an enterprise, a subdivision or department of that enterprise, or who customarily and regularly directs the work of at least two or more full-time employees.

The administrative exemption is reserved for employees who are paid more than \$455 per week, and whose primary duty consists of office or non-manual work directly related to the management or general business operations of the employer. Clericals, for example, are usually never administrative employees.

The learned professional exemption is reserved for those who make more than \$455 per week and perform work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

Other exemptions are the computer employee exemption (must receive not less than \$455 per week or receive at least \$27.63 per hour); the outside sales exemption (primary duty is making sales and the employee is customarily and regularly engaged away from the employer's place of business); and the highly compensated employee who performs office or non-manual work, is paid a total annual compensation of \$100,000 or more and exhibits other exempt functions.

All employers should review whether their salaried-exempt employees fit within one of these exemptions. If a salaried employee is improperly classified, the overtime liability could stretch back three years. Liability is derived by dividing each week's salary by the



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total hours worked for that week to arrive at an average hourly rate. Half of that average hourly rate would then be owed for all overtime hours worked in that week.

Salary deductions: Even if an employee qualifies as exempt, the employer will lose the exemption if prohibited deductions are taken from that employee's salary. While deductions are permitted for Family and Medical Leave Act absences, for example, they are otherwise highly restricted. An employer who is deducting for absences from a salaried employee's pay must make sure those deductions are proper.

Working time: Many employers fail to properly capture all time worked by their non-exempt employees. Orientation, training and certain travel may be considered working time and must be included as time worked for the purposes of determining whether overtime is owed. The employer must capture most preliminary activities by an employee.

Bonuses: Any lump sum incentive bonus given to a non-exempt employee, such as a production, attendance or safety bonus, will inflate the average hourly rate for that employee during the period of time covered by the bonus. Since overtime must be based on the average hourly rate for each week, overtime liability will occur if the correct hourly rate was not used to calculate the overtime.

The only way to circumvent the problem is to classify an incentive bonus as a percentage of total earnings for the bonus period.

Lunch and rest periods: Generally, an employer must always pay for rest periods. Lunch periods can be unpaid but only if the employee takes a full half-hour uninterrupted lunch. If the employee takes less than a half-hour lunch, the entire time must be counted as hours worked and compensated. Also, minors in Louisiana may not work more than five consecutive hours without a 30-minute meal break.

Compensatory time: Private employers generally cannot use compensatory time to satisfy overtime obligations. An employer may only use compensatory time if it allows the employee to take the compensatory time within the pay period it was accrued. This is usually not practical.

All businesses, no matter what their size, should have an expert review their pay practices to determine potential problems. With multiple plaintiffs, liquidated damages and attorneys' fees, these types of mistakes can be very costly. •

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