

Business Times

Fresh ideas for growing companies

Lawsuits target employers over wage and hour violations

BY FRANK GUMINA, for SBT

Litigation challenging employer pay practices is sharply on the rise. These cases are costly, and particularly devastating to smaller employers and their owners who may even be held personally liable despite the corporate shield.

The message to businesses is clear — take active steps to ensure you are in compliance with both federal and state wage and hour laws.

Wage and hour claims take many forms. A lawsuit forced Wal-Mart to pay \$74 million for employees forced to work during lunch breaks. Numerous pharmaceutical and health device companies have recently been hit with class action lawsuits claiming that their sales employees lacked independent judgment to be considered exempt from overtime. The federal Department of Labor recently issued an opinion letter stating that deductions from the salaries of exempt employees for loss or damage to company property (e.g., cell phones, laptops) violates the salary basis test.

Last year employers in Wisconsin paid out millions of dollars in settlements through the state's Equal Rights Division and the federal Department of Labor. A single employee complaint can mushroom into a government audit and liability for every similarly situated employee, whether or not they filed a claim.

The good news is that wage and hour cases can be prevented. Careful, proactive attention to the wage and hour regulations and employer pay practices can substantially reduce the potential for such litigation.

With few exceptions, only managers, professionals and administrative employees paid on a salary basis or outside sales-

people are exempt from overtime pay. Employees who are incorrectly exempted and paid a salary can be costly. For example, an employee who works a few hours over forty each week, or works through lunch hours, or who is encouraged to set up his or her workspace before the start of each shift or "clean up" on personal time, can rack up a considerable amount of annual overtime. Multiply this times 100 employees and the potential bill is staggering.

Some of the most common mistakes include relying on the title "manager" or believing that all employees working in an office environment are "administrative" employees. For wage and hour purposes, managers may be salaried only if their primary responsibility is managing two or more employees in a recognized department or where they have the authority to hire, fire, or make weighty recommendations regarding employment. A single misclassified "manager" working just 10 hours of overtime per week can rack up tens of thousands of overtime damages.

Likewise, employees are not necessarily "administrative" because they work in an office environment. This is especially true in service businesses like insurance companies and financial institutions. For instance, Farmers Insurance faced a multi-million dollar judgment when a court found that insurance claims adjusters did not meet the

administrative exemption.

To avoid this trap, employers must recognize the difference between important and advanced skills, and the use of discretion and independent judgment. If an employee uses well-defined and long-applied standards, even in evaluating complex information, too little discretion may be found to justify the administrative exemption. Bookkeepers, staff accountants, administrative assistants and others are often not qualified for this exemption.

Employers should routinely review exempt employees in their organization to determine if they truly meet state and federal standards. (These standards are not the same.) Some helpful tips:

- Make certain managers are engaged in managerial duties on a nearly full-time basis, not merely holding a "lead" role or serving in name only.
- Determine whether administrative employees are consistently exercising independence and discretion in management-related functions as opposed

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to determining outcomes based on employer-established standards.

- Review whether professional employees are exercising independent and professional skills related to their degree, or whether others are performing similar jobs without a related four-year degree.
- Do not pay salaried employees less for short work weeks.

The maze of wage and hour regulations is complex, attracting more significant litigation risks and governmental attention each year. Proactive review is warranted to stay in compliance, and reduce, or eliminate, your company's financial exposure in this area.

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