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WAGE & HOUR LAW: AN ESSENTIAL OVERVIEW

By Anne DeAcetis

Most employers (and their Human Resource departments) engage employees with the best of intentions. But wage and hour laws regularly change, and it can be hard to keep up with new requirements. Companies must balance pursuing business goals with following firm employment rules—or pay a potentially heavy price.

The US Department of Labor estimates that up to 70 percent of employers are noncompliant with wage and hour law. Mistakes might slip by unnoticed in a thriving job market full of happy workers. But the current downturn, with its high levels of unemployment—and anxiety even among the employed—has spurred a minor explosion in wage and hour cases.

Most cases are filed under the Fair Labor Standards Act (FLSA), a federal law that outlines strict standards for record-keeping, overtime and employee classification. Wal-Mart recently settled 39 consolidated cases (involving three million employees) for \$65-\$85 million. FedEx is now facing its own wage and hour allegations. Every employer would be wise to take note of

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Andrew W. Singer, Esq., partner of Tannenbaum Helpert Syracuse & Hirschtritt LLP, visited TemPositions on October 29, 2009, as part of the company's HR Roundtable Series. Singer has experience in all aspects of employment law and is a regular seminar leader on topics from discrimination to employee classification. He offered an overview of

the latest requirements.

Singer did note that some areas of the law are still in flux. There are few firm guidelines regarding social media (checking up on applicants/employees on Facebook, Twitter or MySpace). But there are many areas in which the law is clear. Singer stressed that employers can greatly reduce their risk by following these clear-cut requirements to the letter.

Required Notices at Time of Hire

It's time for companies to revise their offer letters or create a new form. One fresh New York State law, in effect as of October 29, 2009, requires employers to notify new hires in writing of their pay/salary and regular pay day. For non-exempt employees, the letter must include the hourly rate and the overtime pay rate. (Temporary firms follow slightly different standards, providing a pay range.) The new hire must then return written acknowledgment to HR.

This seems simple, but Singer reminded everyone that determining exempt vs. non-exempt status isn't always easy. Under this new law, the question now must be addressed at the time of hire.

Commission Agreements

A 2007 New York law states that all commission employment details must be agreed upon in writing. The terms of employment and compensation must be signed by both the employer and the employee, and the employer must keep the agreement on file for at least three years.

Singer stressed that specificity is highly important. If an employee brings

a case claiming they did not receive agreed-upon commission, it's up to the employer to present the written agreement and disprove the claim. Without this record, the employee's word stands.

Little known fact: Unpaid internships are mutually beneficial...but unlawful.

Record Keeping

The Department of Labor reserves the right to inspect payroll records at any time. New York State requires that employers keep payroll records accessible (that means onsite, not in storage) for six years. Records must include name and address, social security number, wage/rate, daily and weekly hours worked, gross wages, deductions from wages and net wages paid.

FLSA has slightly different requirements. For three years, employers must retain the information above as well as pay dates, sex and occupation. For two years, employers must retain wage rate tables and/or timecards (anything that documents daily start and end times) for non-exempt workers. For exempt employees, attendance records alone suffice.

Many HR Roundtable attendees work for companies that outsource their payroll function. Several noted that the reports they receive do not necessarily include all this information, and Singer stressed that they must keep additional records or renegotiate with their payroll partners. The compliance burden, after all, falls to the employer.

Singer recommended holding all records for six years, and of course, retaining pensioners' records long-term. This may well be burdensome, especially for employers with limited space.

But without records, Singer noted again, companies are vulnerable. The most outlandish accusation from a disgruntled employee will be considered true if it can't be disproven.

Meals and Breaks

New York State labor law is clear on meal times. If employees work six hours or more for a period that extends over "lunch time" (11am to 2pm), they get a meal break of at least 30 minutes. If they start working before 11am and keep working until after 7pm, they get a second meal break at "dinner time" (5pm to 7pm) of at least 20 minutes.

If the workday starts between 1pm and 6am and lasts more than six hours, the employee gets a minimum 45 minute break sometime in the middle of their shift.

The Department of Labor grants some exemptions, but companies must formally apply. It's interesting to note that even employees themselves can't waive their breaks. If an employee asks to take a break at the end of a shift in order to leave early, the employer must say no.

Sick Leave & Vacation

Employers are currently not required to provide paid sick leave or vacation time. But they are required to notify their employees in writing about company policy on vacation, sick days, holidays and office hours. Policies can be posted or included in an employee handbook.

The key, Singer stressed, is to be absolutely clear. Companies can specify that they won't pay for unused vacation or sick leave if an employee is terminated. They have full authority to dictate whether or not vacation time can roll over. But it must be in writing.

Singer also noted that these laws are likely to change. One pending new bill would require employers to provide up to 72 hours of paid sick leave per calendar year for employees working in New York City. (Per NPR, this is partially in response to the spread of H1N1 in New York.)

Frequency of Payment

By law, most employees must be paid semi-monthly. Commissioned employees can generally be paid less frequently, but at least once a month.

Overtime

If a non-exempt employee works more than 40 hours in a work week, FLSA requires that they be paid overtime: one and a half times the employee's normal hourly rate ("time and a half").

Many executive, administrative and professional positions are exempt. They must be paid at least \$455 per week (or

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\$545.75 per week in New York). But they must also perform specific duties. Executives must manage the business, supervise two or more, and have a voice in hiring and firing. Administrative workers must have responsibility for non-manual work that supports management; they also must act with some autonomy. Learned professionals, like lawyers, are exempt because their work requires advanced knowledge and independent judgment.

Other exceptions include some computer professionals, outside sales employees and some commissioned salespeople. In general, these workers are exempt because of high pay rates, a greater percentage of pay coming by commission or because they sell directly to consumers.

Variations in the law do exist. A learned professional filling a lower-level position (for example, a CPA working as a bookkeeper) may become non-exempt.

Employers may be surprised to learn all the things they can't deduct for...

Bonuses

Employers are not required to give bonuses, but many do. The key is to be explicit, in writing, about what employees can expect. If bonuses are tied to performance, employers should specify whether they mean the performance of the single worker or the performance of the business overall. Employers should also include specific details on how

bonuses will be calculated.

Per Singer, the safest way to handle bonuses is to state that they "shall be payable at the sole discretion of the company." He also recommended stating that bonuses won't be considered "earned" until the company pays them, and that bonuses won't be paid if employment ends.

Wage Deductions

The law is highly protective of employee wages. Of course, there are authorized deductions for taxes, benefits (pension or health and welfare), charitable contributions, payment of union dues and oddly enough, payments for US Bonds.

But employers may be surprised to learn all the things they can't deduct for, like damage to company property, theft, misconduct or quitting without notice. Companies can't use wage deductions to fine employees for lateness or force the accident-prone to contribute to office maintenance. If they choose to loan money to an employee, repayment of the loan can't come out of the employee's wages, even if they agree to it.

Some New York companies are confused by a clause in Labor Law Section 193, which mentions deductions made "for the benefit of the employee." This refers to certain benefits, not favors (like loans) or workspace repairs, even if the employee made them necessary. Advancing vacation time is also a risk. If the employee leaves, wages for those days can't be withheld.

In short, exceptions to wage deduction law are so narrow, they are practically nonexistent. Even recouping wages that are paid accidentally falls in tricky legal territory. (Singer recommended clear communication with the employee and a very gentle repayment schedule.) If an employer is owed money by an employee and there is any dispute, the safest route is small claims court.

Termination

Employers have five days to notify terminated employees in writing of their termination date and when their benefits will be cancelled. All remaining wages due to the employee must be paid on the next regular pay date.

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New York law does not require severance pay, but many employers offer it. Singer urged everyone to standardize a policy and include it in the employee handbook. Even a clause stating that severance will be paid “at the company’s discretion” affords some protection, though the formula for calculating severance should be consistent. If the company extends different severance packages to different people, even inadvertently, it can be perceived as discrimination.

A Word on Unpaid Interns

In a difficult job market, it’s tempting for both companies and potential employees to see unpaid internships as mutually beneficial. The only problem, Singer said, is that they’re unlawful. FLSA defines “employee” very broadly. It’s designed to protect workers from exploitation—even if they would willingly work unpaid in hopes of developing an opportunity.

Intern positions must meet specific requirements. They must provide vocational training and overwhelmingly benefit the intern. In very specific ways, they can’t benefit the company; an intern can’t displace regular employees or complete work that appreciably supports the business. Legally, the definition of an intern is very narrow. Companies that try to broaden it take a risk.

A Word on Independent Contractors

For many companies, hiring independent contractors makes good business

sense. But it’s critical to ensure that they are truly ICs in the eyes of the law. More than ever, the US government is investigating employee misclassification to recoup lost tax revenue. The IRS has reclassified ICs as employees in 90% of audited cases.

A true IC is self-employed. They make their own hours and work for multiple companies. They are responsible for their own retirement planning and healthcare—those benefits don’t come from their employers. Their employers don’t withhold for Social Security, Medicare, workers’ comp, disability, unemployment or taxes. ICs are not protected under the same wage and hour laws as employees. At the end of the year, they simply receive a 1099 showing gross pay.

Trouble arises when companies hire ICs to do work that government believes to be the business of employees. Even if a company and a worker agree to an IC relationship, the government can fine the company and recoup back taxes if they find evidence of an employer-employee relationship. Misclassification can even result in criminal charges.

If bonuses are tied to performance, employers should specify whether they mean the performance of the single worker or the performance of the business overall.

(While ICs are not employees, companies should also remember that they may be liable for an ICs behavior. Some version of the employee handbook, per Singer, should be distributed to ICs so that they’re well aware of company policies.)

In general, workers are considered employees if they are supervised (work under the company’s direction) and if they perform the same or similar tasks as employees. Many businesses hire ICs for overflow, but this is unlawful. Such workers are considered temporary employees, not ICs.

The Supreme Court identified several factors to consider when classifying a worker. How specialized is the work? Critically, is the worker’s skill shared by employees at the company? (If so, the worker is temporary, not independent.) Is the worker onsite? Do they have office

space or business cards? Do they use employee email and phone systems? Do they present themselves as company representatives? How closely are they tied to the company’s core business?

The IRS monitors three criteria of its own: behavior control, financial control and relationship perception. A true IC performs tasks independently, without undue supervision or direction. The company they work for will not interfere with their independent financial operations. And lastly, a true IC is plainly understood to be independent by both the worker and the company. (But again, agreement between company and worker isn’t always binding.)

Singer recommended using ICs only for highly-specialized work that cannot be done by any employee. To handle overflow or to complete work that is tied directly to a company’s core business, Singer’s advice was clear: work with a reputable temporary agency like TemPositions. By providing benefits and issuing W-2s, TemPositions insulates its employment partners from costly misclassification suits.

Conclusion

It can be challenging to juggle the needs of a business with wage and hour requirements. But with growing scrutiny on wage and hour compliance, the risk is too great. Cutting corners now carries a potentially high price tag later. The solution, though sometimes burdensome, is simple: follow the law.

As Singer stressed, the perception of mistreatment is sometimes all it takes to launch an investigation. Most lawsuits are started by employees who feel angry over some perceived slight. Companies may have believed themselves compliant, but even honest mistakes can begin to look sinister if they find their way into the courts.

Keeping current on wage and hour law is more than the right thing to do. It’s smart business. In both legal and

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practical terms, compliance sets the stage for a healthy employer-employee relationship. Companies that make this effort can enjoy the benefits of a stable, happy workforce—and skip the risk.

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