

The Pandemic - Unforeseen Events and Unforced Errors

Employers have rarely, if ever, been confronted with challenges as difficult or unique as they have faced over the past 18 months. The Coronavirus pandemic has been one of those once-in-a-lifetime events that no one, especially employers, ever wants to see again. From its first impact employers across the board have had to adapt to the federal government's constant revisions and updates to its guidance for maintaining a safe workplace.

As businesses began to resume operations, the numerous operational problems were exacerbated by a lack of returning employees and inability to hire new ones. Substantial increases in starting pay to help attract applicants were somewhat successful, but created the unintended consequence of wage compression, often upsetting existing employees. This resulted in unhappy, experienced employees leaving for open positions that offered more money for their experience in addition to quickly departing new hires job hopping through abundant available jobs. More employees have been leaving their jobs than at any time since 2000.

In addition, the expanding government regulation into U.S. workplaces has been expanded in the name of COVID-19 prevention. Centers for Disease Control (CDC) guidelines effectively became requirements. Most recently, the Biden administration has gone further by mandating that employers with 100 or more employees require that they be vaccinated or show a negative COVID-19 test on a weekly basis. As of this writing, several states as well as business groups have pledged to challenge this OSHA Emergency Temporary Standard when it is finally issued. The vaccination mandate for employees of federal contractors, issued on September 9, 2021, may prove more difficult to challenge, since the federal government is largely free to decide with whom it will do business.

These are merely a few of the hurdles that employers have had to overcome as the result of the pandemic. That is why steering clear of any self-inflicted harm, such as legal missteps, is so critical. One example that arises all too frequently is wage and hour violations under the Fair Labor Standards Act (FLSA) or similar state laws. Chief among these violations is misclassification of employees as exempt from overtime. The overtime exemption for "administrative" personnel is most frequently misapplied. Some employers mistakenly believe that an employee working in an office environment and performing work such as that of a bookkeeper, accounts payable or receivable clerk, or some similar clerical position, qualifies under the "administrative" exemption if the employee is paid a salary. In most situations that assumption is erroneous.

To qualify for the "administrative" exemption, an employee must be paid a salary of at least \$684.00 per week (\$35,568.00 annually) and perform certain duties. These duties must be "office or non-manual" work directly related to the management or general business operations of the employer or the employer's customers. The employee must also exercise discretion and independent judgement with respect to matters of significance, which is most often at issue. Both the type of work performed as well as the importance of the work are relevant. The exercise of discretion and independent judgment "implies that the employee has authority to make an independent choice." Exempt "administrative" employees possess the authority to commit the employer in matters of significant financial impact or with authority to waive or deviate from established policies and procedures without prior approval. Using skill and experience in applying established procedure or standards generally will not satisfy the "discretion and independent judgement" requirement. Examples of exempt administrative jobs would be purchasing agents, human resources personnel, buyers, inspectors, and executive assistants, among others.

The harm that could result from misclassification comes in the form of a Department of Labor (DOL) claim or private lawsuit. Either could result in backpay for overtime wages for up to three-years for each week that a misclassified employee worked more than 40 hours. There is also the risk of liquidated (double) damages and DOL fines for each violation. If the matter is the subject of a private lawsuit, the employer would also be responsible for the complaining employee's attorney's fees. If

multiple individuals have been misclassified, the violations could be pursued as a collective and/or class action.

Another common wage and hour violation is off-the-clock work. These claims have escalated in recent years across nearly all workplaces. They often arise after an employee has left the employer. These claims can involve both preliminary and postliminary activities to the principal activities of the job. In certain industries “donning and doffing” of equipment can be compensable if “unique items are involved.” Similarly, preparing equipment and vehicles, transporting tools and equipment, security screenings, shift-change activities, and attending meetings and training programs are usually compensable time. The routine review and response to work-related e-mails or texts after the end of the normal workday has also served as the basis for off-the-clock work claims. Since most employees are plugged in 24/7, this has become a common problem.

The measures necessary to help avoid both misclassification of employees and off-the-clock work claims are relatively straightforward. In the case of misclassification, employers should carefully review both the job descriptions and day-to-day activities of all exempt employees. The job description should accurately reflect the work performed and comport with the claimed exemption. Regarding off-the-clock work, the best course of action is to post a notice to employees that no overtime work or work off-of-the-clock may be performed without the employee's supervisor's prior authorization, and that violations will result in disciplinary action. The notice should also inform employees that repeated violations will result in termination. While employers are required to pay employees for off-the-clock work, even though unauthorized, employers can and should discipline and even terminate employees for repeated violations.

Though little can be done to help ease lingering distress over events during the pandemic, being aware of and taking steps to avoid common wage and hour violations should make the future a little brighter.

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