‘Wage theft’ rare, mistakes more common

Wise employers are proactive in their payroll practices to help avoid costly class action lawsuits

B2BExpert

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There was a time when people who were successful in business were admired and celebrated as examples of what one could accomplish in a free-market economy. They were called “entrepreneurs,” “captains of industry” and “pillars of the community.”

Today there is a new name for these individuals — “The 1%.”

While it is still too early to determine the overall impact of the Occupy Wall Street movement, this much is clear: It has underscored a growing division between the “haves” and the “have nots,” management and labor and employers and employees. The level of tension between these groups has ebbed and flowed throughout the course of history, but in the last two years it has increased exponentially and could pose a significant challenge for many businesses that are struggling to survive in an uncertain financial environment. Ironically, this phenomenon occurs at a time when these groups desperately need to find a way to work together to avoid a deep and lasting decline in our economy.

At its core, the OWS movement is focused on the large incomes earned by certain individuals and the wealth this allows them to accumulate. A number of recent story lines, websites and blogs are making the case that all too many of the 1% have arrived at their station in life by committing “wage theft” on their loyal and hardworking employees. Having practiced in this area for 22 years, I believe that willful violations of wage laws are the rare exception, not the rule. In fact, a report prepared for the Department of Labor Wage and Hour Division notes that over the decade from 1998 through 2008, only 3 percent of cases investigated by DOL resulted in penalties of the type that are issued where willful violations of the law are found. Most wage and hour cases involve employers who are unaware of the specific requirements of the law or those who are aware of the law, but inadvertently fail to apply it correctly. The statutes, caselaw and regulations in this area are voluminous. In some instances, wage laws are straightforward and easy to apply. In other situations, though, employers often struggle to discern between various shades of gray when applying these rules and regulations to the workplace.

Perhaps the best measure of the complexity of this area of the law is the fact that wage and hour class action litigation is the fastest growing area for attorneys who represent employees in lawsuits. This type of suit provides attorney fees for the employee’s counsel if any violation is found. It also includes back wages for all of the employees affected and liquidated damages in an amount

equal to the back wages owed. Where the case involves a large number of employees who are similarly situated and who have been incorrectly paid for the last two years, the total liability can easily reach the million dollar mark — hence the popularity and profitability of this type of suit for plaintiff's attorneys.

Lawsuits of this type are not the stuff of which Grisham novels are made. Frequently, they involve some of the most mundane policies and practices that you will find in the workplace. Common problem areas for employers include: (A) misclassification of nonexempt employees as exempt; (B) mistakes with respect to the payment of a "salary" for exempt employees; (C) employees working "off the clock" before work, at lunch or after work; (D) pay for travel time where the employee performed some work before travelling — particularly in the construction industry; (E) failure to pay overtime at an appropriate rate when the employee is performing work at two or more different rates for the employer; (F) failure to include nondiscretionary bonuses in an employee's regular rate calculation for overtime purposes; (G) failure to pay an employee for putting on/taking off certain equipment or clothing that is integral to the performance of the job; and (H) failure to properly pay employees for "on call" time. None of these are the type of high-profile issues that make the headlines, but they are profitable for those attorneys who can successfully identify and litigate with an employer over simple mistakes.

There are four steps that we recommend employers take to minimize liability for the types of problems described above.

1. Train your front-line supervisors. Most wage and hour violations don't start at the top of the organization or in the human resources department. Instead, they typically involve a front-line supervisor who has little or no understanding of how the law should be applied. If someone at the top of the organization tells a supervisor to cut overtime costs, does that mean employees should still work overtime, but not record it? Of course not, but that is how some supervisors might interpret such a directive. Front-line supervisors need to be management's "eyes and ears" on wage and hour issues. Avoiding lawsuits over improper payment of wages should be a key element of the supervisor's job duties. When properly trained, these individuals can be the strongest link in the chain of compliance, not the weakest link.

2. Include a "safe harbor" provision in your employee handbook. As a result of all the litigation surrounding the "salary basis" test, the DOL promulgated a regulation allowing employers to limit liability for violations in this area by including a provision in your employee handbook noting that improper deductions from an exempt employee's salary are prohibited and that if such deductions occur, there is a complaint process by which the employee can seek reimbursement. If an employer has this policy in place and makes a good faith commitment to comply with the law in the future, the exempt status of employees will not be destroyed unless the employer willfully violates the policy by continuing to make improper deductions after the complaint.

3. Conduct your own informal audit. One of the best ways to assess whether you are in compliance is to engage the services of a consultant — often a former wage and hour investigator — to conduct an informal audit on your company. Many of these individuals are willing to conduct a discreet audit for a very reasonable price. If your attorney hires the consultant to do the audit, the findings can be protected from disclosure as attorney-client work product. If certain issues are in a gray area and you want to change them to avoid any question of liability going forward, you can also talk with the consultant and your attorney about how best to implement changes to your current policy or practice without exposing your company to liability.

4. Review the procedures that you follow when you terminate an employee. Too many wage and hour class action lawsuits begin when an employee believes that his or her employer has fired him or her unjustly. In the majority of these cases, although the termination might be viewed as unfair, the plaintiff's attorney must tell the employee that it was not unlawful and that there is no viable legal basis for a lawsuit. However, the next words out of the attorney's mouth could be "What about your employer's pay practices?" "How many other employees were treated in the same manner?" "How long were all of you treated that way?" At this point, the disgruntled employee's weak employment law claim may be converted into a robust case of "wage theft."

Anything an employer can do to make the employee's termination process go more smoothly and to keep the employee from making a visit to an attorney's office will drastically reduce the potential for such wage and hour liability.

Some best practices utilized by employers to accomplish this goal include: (A) being clear about what gets paid upon termination (vacation, sick leave personal days) and making sure that employees understand these rules before the termination occurs and are paid correctly in the final paycheck; (B) having a small group of individuals in your company who conduct the termination meetings and who have experience and training in how to convey the decision in a respectful way that allows the employee to retain his or her dignity; (C) employing a third party (or allowing someone within the company) to conduct an internal appeal or at least an exit interview to allow the employee to express any concerns he or she might have about the company and its conduct before the employee leaves the office and schedules an appointment with an attorney; and (D) offering outplacement or some type of severance agreement and release to the departing employee to settle the lawsuit before it begins. If an employer has a problem with its payroll practices or procedures, the money spent on any of the items listed above will be a fraction of the cost that a class action lawsuit would pose for the employer.

The economic climate has never been more conducive to the filing of lawsuits for improper payment of wages. The tensions stoked by the OWS movement, the number of employees who have lost jobs, the payment of attorney's fees for those who successfully lead the charge for employees and the ability to aggregate individual employees into a collective action, have all created a perfect storm — one that employers need to prepare for by proactively addressing any shortcomings in their payroll policies and practices.

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