

Wage and Hour Laws: Traps for the Unwary

The laws governing payment of wages and overtime pay present a number of pitfalls which can result in costly employer mistakes — including treble damages and criminal penalties against individual corporate officers. For example, employers should not assume that paying an employee on a salary basis renders an employee exempt from overtime requirements. Other common misconceptions include the practice of bi-monthly pay periods, and allowing employees to “work through lunch,” both of which may violate state law. This article summarizes some of the more common traps for the unwary in this area and offers some tips on how to avoid them.

Loss of Exempt Status Through Improper Salary Deductions

Most employers understand that under the Fair Labor Standards Act (“FLSA”) and Massachusetts law all employees must be paid overtime (time and a half) for any hours worked over forty in one week, unless the employee is exempt from such requirements under the FLSA. In order to be deemed exempt under the so-called “white collar” exemptions, an employee: (1) must be paid on a “salary” basis of at least \$455 per week; and (2) must be classified as an executive, administrative, professional, computer professional or outside sales employee on the basis of the specific job duties he or she performs. Evaluating whether an employee meets the criteria for exemption based on his or her job duties is difficult enough, as it involves a fact-specific inquiry concerning the employee’s day-to-day activities. However, the first test — being paid on a salary basis — is sometimes overlooked by employers, and failure to meet this test will also result in loss of exempt status.

Payment of wages on a “salary” basis means that an employee regularly receives

a predetermined amount of compensation each pay period regardless of variations in the quantity or quality of an employee’s work. If an employer fails to pay “salaried” employees properly, exempt status will be lost and the employer may be obligated to pay overtime for the entire class of employees involved.

This means, for example, that an employer may not make deductions from an employee’s predetermined salary because of the operating requirements of the business, such as lack of work. Similarly, employers may not make deductions from pay of exempt employees for partial day absences.

There are some exceptions to the general rule that employees must be paid their full salary for any week in which they perform work. Deductions from pay of exempt employees are permissible for:

- ✓ absences of one or more full days for personal reasons other than sickness or disability;
- ✓ absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- ✓ offsetting amounts employees receive as jury or witness fees, or for military pay;
- ✓ penalties imposed in good faith for infractions of safety rules of major significance;
- ✓ unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions;
- ✓ the initial or terminal week of employment; or
- ✓ weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

As noted, deductions from an exempt employee’s salary generally may not be made for partial day absences, whatever the reason

(although partial day deductions may be made from an employee’s accrued paid time off hours in certain circumstances).

Some employers have incurred liability for having a practice of making improper deductions from salary. Employers may reduce this risk by (1) establishing a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimbursing employees for any improper deductions, and (3) making a good faith commitment to comply in the future. If these steps are followed, the employer will not lose the exemption unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Salary Payment Does Not Guarantee Exempt Status

A common misconception is that payment of a salary results in exemption from the overtime requirements of the FLSA. As discussed above, in order to be exempt from overtime payments, the employee must be paid on a salary basis *and* the employee’s job responsibilities must also fall within one of the exempt categories, including the “white collar” executive, administrative, professional, computer professional, and outside sales exemptions. Many salaried employees do not qualify for any exemption from overtime obligations, and relying solely upon whether an employee is paid a salary in categorizing them as exempt or non-exempt will almost certainly result in misclassifications.

Risks of Misclassification Under the FLSA

Failure to properly categorize an employee as exempt or non-exempt under the FLSA carries substantial risks. Employees who should have been classified as non-exempt will be owed overtime pay (plus interest) for all hours worked in excess of forty per week, going back two years and even three years if the misclassification is found to have been “willful.” Furthermore, possible penalties for violation of the FLSA include liquidated damages (payment of twice what is owed), attorneys’ fees, and litigation costs. Employers are also prohibited from retaliating against employees for asserting claims under the FLSA.

Further, employers are required by law to keep accurate records of the time worked by employees. Because employers frequently do not keep track of exempt employees’ hours, if such employees turn out to be misclassified and are owed overtime, the employer often is unable to provide a record of the time actually worked by the employees. In this situation it becomes very difficult to prove that an employee is not exaggerating his or her overtime wage claim.

Payment Of Wages Upon Termination

The Massachusetts Payment of Wages Act provides that any employee discharged from employment must be paid his or her wages in full (including any accrued but unused vacation pay) on the date of discharge. Many employers are unaware of this provision or choose to ignore it, as it may be difficult to generate an accurate final paycheck on the employee’s last day of employment. Regardless, employers should make every effort to comply, and should not delay payment of a final paycheck for administrative reasons or until deductions for amounts possibly owed by the employee have been determined.

Even when payments are delayed by only a few days, there is a technical violation of the Wage Act which may result in treble damages, an award of attorneys’ fees, and personal liability of corporate officers. Employees are increasingly asserting such

claims, often together with other claims. If preparing a final paycheck on the date of a termination is not practical or has been overlooked, one solution is to continue with the termination and advise the employee that the termination will be effective on a future date (when a paycheck can be available) but the employee will not need (or be allowed) to report to work during the intervening period.

An employee who leaves employment voluntarily, however, is not owed his or her final paycheck until the next regular pay period; this paycheck must also include pay for any accrued but unused vacation

Non-payment or Deferred Wages May Violate the Wage Act

Postponing employee compensation may be a tempting practice, especially in a cash-strapped start-up, but doing so violates the Wage Act, which provides that all employees must be paid at least the minimum wage on a regular basis. Even if a portion of an employee’s compensation is deferred (over and above the minimum wage), this can create an unexpected problem if the employee quits or is terminated, at which time the employee must be paid the entire balance of monies owed. Moreover, such practices can have significant negative tax implications (if income is deferred until a later tax year) under recent revisions to the Internal Revenue Code.

Pay Period Misconceptions

Massachusetts law governs how frequently employees must be paid, yet many employers find that they have inadvertently violated these rules. Under Massachusetts law all employees must be paid at least weekly or biweekly (every two weeks) and within six days of the end of the pay period during which wages were earned. Employers who instead pay their employees only twice a month violate these rules in two ways: by paying less frequently than biweekly, and by failing to pay within six days of the end of the pay period. While exempt employees may be paid semi-monthly, or elect to be paid monthly, there is no exception to the biweekly payment rule for non-exempt employees.

Meal Breaks

What’s the harm if an employee occasionally “works through lunch”? It could be a viola-

tion of Massachusetts law, which provides that any employee who works more than six hours a day must be allowed at least thirty minutes unpaid time for a meal. Violation of a similar California state law resulted in a recent jury verdict of \$172 million (including \$115 million in punitive damages) against Wal-Mart.

Employers also must be careful to pay employees if they work during a meal break. According to the Massachusetts Attorney General, if an employee is restricted in movement during the break or if the employee must perform a job function during the break, compensation must be paid. While an employee can waive such a break, any waiver must be voluntary.

Misclassification as Independent Contractors

No review of wage and hour pitfalls would be complete without mention of the problems associated with independent contractor issues, as discussed in a prior ELA (http://www.mbbp.com/practices/employment/ela/ela_0205 - using independent contractors.pdf). Misclassification of employees as independent contractors can result in liability and penalties for failure to pay overtime, FICA and FUTA contributions, unemployment insurance payments, and workers compensation insurance premiums, as well as subject the employer to other civil and criminal liability. Employers who remain uncertain about the proper categorization of contract workers are advised to consult counsel.

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