10 Common Mistakes U.S. Employers Make When Trying To Comply With Employment Laws

by Ellen M. Leibovitch

Many employers think they understand employment laws like the Fair Labor Standards Act, 29 U.S.C. §201, et seq. (FLSA), only to find out – after costly litigation – that they were just plain wrong. In this article, I will highlight 10 of the most common mistakes that private, non-governmental employers (with a non-unionized work force) make when attempting in good faith to comply with employment laws.

1 Paying an employee a salary and assuming the employee need not be paid overtime

The FLSA is a federal law which establishes minimum wage, overtime pay, recordkeeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. The FLSA applies to employers through either ***"enterprise coverage"*** (businesses with at least two employees that have an annual dollar volume of sales or business done of at least $500,000) or ***"individual coverage"*** (businesses whose workers are regularly involved in commerce between the states or ***"interstate commerce"***).

Many employers assume that employees who are paid a salary – as opposed to an hourly rate of pay – do not have to be paid overtime under the FLSA.

Whether an employee should be paid overtime for working more than 40 hours a week does not depend on whether the employee is paid a salary.

Better put, simply paying an employee a salary does not excuse the payment of overtime. If an employee is not exempt as that term is defined under the FLSA, then the employer is required to keep track of the employee's hours worked and pay overtime at time and one-half the employee's regular rate of pay if the employee works over 40 hours in a week.

Any employee who is not an executive, a manager or who does not exercise high level decision-making is probably not exempt. The determination of whether an employee is exempt or non-exempt is a factual inquiry that depends on the employee's job duties, not the employee's title.

For example, if an employee has the title of ***"manager"*** but does not actually supervise two or more people and does exactly the same work that the hourly employees do, that so-called manager may very well be a non-exempt employee.

While a non-exempt employee can still be paid a salary, timekeeping and payment of overtime for working over 40 hours in a week is nonetheless required.

2 Not having an employee handbook

Most state and federal anti-discrimination laws apply to employers with over 15 employees. In fact, some local anti-discrimination ordinances cover employers with as few as five (5) employees. Employers who are covered by these laws need to make sure to have policies in place to prohibit sexual and other harassment, discrimination and retaliation.

These policies must also include procedures for making and investigating complaints of harassment, discrimination and like. While no law requires employers have an employee handbook, the handbook can be a useful tool for an employer to memorialize and enforce its personnel policies and procedures and can help an employer prove compliance with the law.

3 Having an employee handbook and not following policies

Even worse than not having an employee handbook is having a handbook but not following the policies! For example, if an employer has a policy that requires the reporting of sexual harassment to a manager, but the manager does not know or understand the employer's duty to investigate the complaint in a confidential manner, the policy is useless.

In that event, the employee who fails to complain to the employer before pursuing legal action will be excused from failing to comply with the employer's policy.

Employers are well-advised to inform managers about the company's employment policies, train managers to ensure compliance and accurately and uniformly enforce such policies throughout the work place.

4 Having all employees sign non-compete agreements

Some employers require all employees sign non-compete agreements. The problem with this approach is that competition cannot be prohibited unless the employer has a *"legitimate business interest"* to protect through the non-compete agreement.

If an employee has access to customer lists or other proprietary and confidential information belonging to the employer which the employer keeps secret and out of the hands of its competitors (as opposed to information that is readily available in the public domain), then a non-compete agreement will be seen as reasonably necessary to protect the employer's legitimate business interests.

However, requiring employees who do not have access to this kind of information sign the same non-compete agreement may diminish the ability to enforce the agreement against those employees who can and should be prohibited from competing.

5 Giving a terminated employee a written letter of termination, two weeks notice and severance pay

Terminating an employee is difficult for both the employer and the employee. Employers who are apologetic about the termination decision often feel they owe certain things to the outgoing employee – like a written termination letter, two weeks notice (or payment in lieu of notice) and severance.

Employers are not required to explain to an employee the reasons for termination, either orally or in writing, except as required under state law or in the rare, *"mass layoff"* situation where the Worker's Adjustment and Retraining Notification (WARN) act 29 U.S.C. §2101, et seq., requires notice prior to a lay-off.

Additionally, employers are not required to give two-weeks notice of termination. In most cases, a terminated employee is toxic to the work environment and should be escorted from the work site immediately after the termination meeting or exit interview.

Finally, employers are not required to provide terminated employees with severance pay. Severance pay is a matter of agreement between an employer and an employee, which usually goes hand-in-hand with an employee's general release of claims against the employer.

Note that most employees who are terminated will still be able to collect unemployment compensation unless the reason for the termination precludes collection under state law.

6 Thinking annual reviews, salary increases and bonuses are required

Unless the employer has specifically agreed to provide performance and compensation reviews or to give periodic salary increases and bonuses, the law does not require any of these things. Under federal law, payment of a minimum wage (currently $7.25 per hour under federal law and higher in many states) is all that is required.

7 Paying employees higher hourly rates for certain shifts and paying employees for not coming to work

Employers may think that requiring hourly employees to work on nights, weekends and holidays warrants payment of a higher hourly rate or even "double time" pay. Absent an agreement or state law to the contrary, the FLSA does not require higher rates of pay for employees who work night shifts, on holidays or weekends. Keep in mind, however, any non-exempt employee who works over 40 hours a week must be paid overtime at time and one-half the employee's regular rate of pay.

Bona fide meal periods (typically lasting at least 30 minutes) or other breaks where an employee is completely relieved of all work duties, are not considered work time and are not compensable.

Similarly, many employers think hourly employees must be given two breaks a day, must be paid when the office is closed for a legal holiday, are entitled to paid time off for a vacation and must be paid when they cannot work due to illness (sick days).

While some states may require that employees be paid when they do not come to work, federal law does not require payment for time not actually worked.

Thus, time taken for breaks, meal periods, vacations, sick days and holidays need not be paid unless the employer has specifically agreed to do so. One limited exception to the *"no required breaks"* rule applies to nursing mothers, and the FLSA also requires that employers provide space for nursing mothers to express breast milk for one year after the child's birth.

Note that, even though break-time is generally not required under the FLSA, if an employer does allow breaks of 5 to 20 minutes, they must be counted as hours worked (and thus paid time). This includes short periods away from work to smoke, go to the restroom, make a personal telephone call, get coffee, etc.

8 Thinking that an employee's schedule cannot be changed without notice and that employees can only be scheduled for a certain number of hours per week

After the weekly schedule is set, changes may be required. Employers have the ability to adjust schedules to meet the needs of the business even if that means disrupting the employee's previously-set schedule.

The FLSA does not cover the scheduling of employees (except for employees under the age of 16 who are limited in the number of hours they can work per day and per week). Thus, neither notice to the employee nor the employee's consent is required when changing an employee's work hours.

Moreover, there is no minimum or maximum number of hours for which an employee can be scheduled, and the FLSA does not define what constitutes full-time or part-time employment. Employers make this determination, but regardless of whether an employee is full-time or part-time, the FLSA will still apply if the employer is a covered entity.

9 Believing you cannot be individually liable for violating the law because your business is a corporation

Corporations are wonderful legal fictions which exist for variety of reasons, not the least of which is to shield its owners from individual liability for corporate wrongdoings. While there are certainly exceptions to this rule, the corporate form generally will prohibit individual liability for violation of the employment laws.

However, the FLSA, unlike most other employment laws, specifically defines employers as as ***"any person acting directly or indirectly in the interest of an employer in relation to an employee."*** 29 U.S.C. § 203(d).

Therefore, managers and corporate officers with operational control of the business can be individually liable for claims brought under the FLSA.

Additionally, common law torts – like assault, battery and defamation – can be brought against corporate officers, employees and managers in their individual capacity. The corporate form is not a shield from personal liability for these acts.

10 Classifying all staff as independent contractors means you do not have to worry about the employment laws

Independent contractors need not receive overtime pay, are not protected by the employment laws and are not entitled to unemployment compensation upon termination. Moreover, employers are not required to pay Social Security and Medicare for these workers or take other deductions from payments made to independent contractors.

Tempting as it may be to classify all workers as independent contractors – thus avoiding application of the FLSA, other employment laws and employer tax liability – the government (i.e., the Internal Revenue Service, the Department of Labor and corresponding state agencies) have created a nationwide misclassification initiative designed to crackdown on offending employers.

The problem of misclassification is rampant in certain industries (such as the construction industry), and such industries the main targets in the initiative.

However, no employer is above the law, and improperly labelling an employee an independent contractor can expose employers to a host of tax and other liabilities, as well as criminal penalties.

The IRS has developed a list of 20 factors to determine whether the worker is an independent contractor or an employee. At its core, the test focuses on whether sufficient ***"control"*** is present to establish an employer-employee relationship or an independent contractor-client relationship.

According to the IRS, these factors should be considered guidelines. Not every factor is applicable in every situation, and the degree of importance or ***"weight"*** of each factor varies depending on the type of work and individual circumstances.

However, all relevant factors are considered by the IRS in probing the relationship; no one factor is decisive.

For more details, go to:
http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee

Conclusion

Litigation against employers has steadily increased over the years as employees have become more aware of their rights, and attorneys who regularly sue employers advertise big awards on bus benches and billboards around the country.

There is no end in sight, particularly since cases brought under the FLSA are lucrative for employees and quite costly for employers who may end up having to pay back wages, liquidated (double) damages, plus attorneys' fees to the plaintiff's counsel and to the employer's own attorney.

Employers who attempt to manage compliance with employment laws without consulting skilled employment counsel may be at risk. If you have made any of the foregoing mistakes, now is the time to seek counsel before you too are served with a potentially costly lawsuit.

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