"Lions, and Tigers, and Wage Related Lawsuits, Oh My!"

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As a management employment lawyer, I say to my clients, "Let me be the repository of my other clients' bad experiences, so that you don't have to go through them yourselves." Warnings help, so here are some areas to beware of before you travel the same path, each of which is the basis of a lawsuit I have recently defended.

Why the warnings? First, law firms are making a business out of suing companies for wage related reasons, even to the extent of soliciting class action participants to sign up on their websites. Second, wage-related laws are becoming more complicated and more harshly enforced.

Businesses can be sued for wage related violations under federal or state law, or both. Plaintiff's lawyers generally sue under both, to increase the period for which damages can be collected to six years under New York state law. While damages for a single employee are often negligible, collective and class actions raise the specter of huge damage awards. Take a class/collective action alleging improper payment to a whole class, multiply the potential damages by the number of employees in the class, 52 weeks per year and by six years, and the results are staggering. Add to this the prospect of liquidated damages (sometimes double damages) and attorney's fees to a prevailing plaintiff, and no wonder employers rush to settle when the ink is barely dry on the complaint. The best defense is to be proactive and identify issues early, so that they can be corrected before litigation arises.

Rule #1: Correctly classify employees.

Two issues that have mushroomed in the past several years involve classification of workers. Lawsuits target improper classification of workers as contractors. One business, for example, hired messengers to pick up checks at closings. The New York State Labor Department found that the messengers were employees based on the degree of control that the business exercised. One cannot simply anoint a worker as a contractor; if there is control over the means or the result, the worker will be deemed to be an employee. And if the worker is deemed to be an employee, the business may have to make up minimum wage and overtime payments, as well as face unemployment, workers' compensation, and IRS penalties.

The second misclassification issue involves incorrectly classifying a worker as exempt. The issue is not whether the employee is salaried. Instead, the appropriate classification (generally as administrative, executive, or professional) depends on a three-pronged test examining the employee's duties, how much the employee is paid, and whether the employee is paid on a salaried basis. All aspects must be present for the employee to properly be classified as exempt.

Rule #2: Determine working time and pay for it.

If a business suffers or permits an employee to work, then the employee must be paid for all time worked. One significant issue is whether preliminary and postwork activities constitute work time. On December 9, 2014, for example, the U.S. Supreme Court ruled that time undergoing post work security procedures is not work time. Businesses should assess their practices to make sure that all work time is paid.

New York employers must be able to prove that employees were given at least a half hour for lunch. Time record programs that automatically deduct for the lunch break have been disapproved. As one client is quickly realizing, incorrectly docking employees' time for lunch without establishing that the employees actually took a lunch break, additionally creates potential overtime issues, since crediting incorrectly docked lunch breaks extends the hours the employee worked each week.

Rule #3: Pay attention to New York's spread of hours and split shift rules.

New York has other rules that result in wage-related lawsuits. Two of the most common are spread of hours and split shifts. New York requires that employees be paid for an extra hour at minimum wage each time that they work a shift that is longer than 10 hours or when they work a shift that is broken, or split during the day. Employers should tag all employees working more than 10 hours in a day or with split shifts, to make sure that the extra payment is made.

These are just a few of the lessons my clients are learning the hard way, from lawsuits. Some of this litigation could have been avoided with proactive analysis and periodic audits. This holiday season, my clients and I give you the gift of learning from their lessons, to help avoid wage related lawsuits. ✦

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