

Wage and Hour Compliance: Top 10 Traps and How to Address Them

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TOP 10 WAGE AND HOUR TRAPS

Why Compliance Matters

- ◆ The U.S. Department of Labor estimates that over **70%** of employers are not in compliance with the FLSA. ***IF we were to factor in varying state laws (NY in particular), that estimate probably increases substantially.***
- ◆ The USDOL collected more than \$270 million in back wages in FY 2017.
- ◆ Wage claims continue to exceed EEO claims.

Why Compliance Matters

Explosion of litigation!

- ◆ Archaic, counterintuitive laws
- ◆ Metastasizing liability

Why Compliance Matters

- ◆ Big penalties and mandatory fee-shifting
 - Back pay, liquidated damages, attorney's fees
 - Often inflated because no record of hours worked
 - In most cases there is a six-year look back period for damages
 - In class or collective actions, these numbers can be tremendous

Liability

- ◆ The growth in wage and hour settlements—which rose to a combined value in 2017 and 2018 of \$1.2 billion—is the No. 1 exposure for companies.
- ◆ A restaurant chain and a group of its employees reached a \$950,000 deal in April 2016 to settle allegations that roughly 25,000 workers were not paid all their owed overtime and regular pay and were not provided meal and rest breaks.
- ◆ Another company reached a \$6 million deal with 18,700 workers in July 2016 to settle wage and hour claims.
- ◆ A company, which operates around 1,000 stores in 6 states, agreed to compensate shortchanged department managers as part of a \$30 million settlement reached in February 2015.

But First . . . Notice Requirements

- ◆ Employers must give **written** notice of wage rates to each new hire and upon reduction of salary/demotion (New York Labor Law (“NYLL”) § 195(3)).
- ◆ The notice must include:
 - Rate or rates of pay, including overtime rate of pay (if it applies).
 - How the employee is paid: by the hour, shift, day, week, commission, etc.
 - Regular payday.
 - Official name of the employer and any other names used for business (DBA).
 - Address and phone number of the employer's main office or principal location.
 - Allowances taken as part of the minimum wage (tips, meal and lodging deductions).
- ◆ The notice must be given both in English *and* in the employee's primary language (if the Labor Department offers a translation).

Notice Requirements

- ◆ Employers must keep records for six years, including the notice acknowledgement, as well as all payroll records.
- ◆ Employers must also give employees a wage statement each time they receive a wage (NYLL § 195(3)).

Wage Statement (pay stub): Required Information under Section 195.3

1. Employer name, address, and phone number

2. Employee name

3. Dates covered by payment

ABC Company, Inc.
1 Main Street Any town, NY 10000 Ph: 518-457-0000

Employee: John Doe

Rate: Hourly	Hours Regular	Hours Overtime	Allowance/ Credit	Gross Current	Gross Year to Date	Deductions Current	Deductions Year to Date	Net Pay	Vacation Year to Date
7.95	40	5		318.00	954.00				
11.93				59.65	59.65				
						FICA	-30.16	-81.34	
						Fed WT	-31.54	-85.06	
						NY WT	-15.77	-42.53	
						Disability	-.60	-1.20	
						Garnishment	-35.00	-105.00	
Uniform pay			\$9.00	9.00	27.00				
Meals (3)			\$7.50	7.50	22.50	-7.50	-22.50		
Vacation Hours Earned			.75						2.25
				394.15	1063.15	-120.57	-315.13	\$273.58	

Pay Period: 4/3/11-4/9/11

Pay Date: 4/12/11

No: 0001

4. Basis of payment (hourly, salary, etc.)

5. Rates paid (regular and overtime)

6. Hours worked (regular and overtime)

7. Allowances or Credits

8. Gross wages

9. Any deductions from wages

10. Net wages

This sample wage statement shows the basic requirements under Section 195.3 for a non-exempt employee paid by the hour, covered by the Miscellaneous Wage Order. Please note that there may be additional requirements based upon the specific pay agreement and/or wage order coverage.

#10: ALL IN A DAY'S (OR NIGHT'S) “WORK”

Top 10 Wage and Hour Traps

What is “Work”?

Modern Problems

- ◆ Must you pay . . .
 - An admin who spends a few minutes per evening checking email on a smart phone?
 - A repairman who checks his home computer first thing in the morning to learn which customer he must visit first that day?
 - A home-based customer service rep for the time spent booting up her computer and logging in each morning?
- ◆ Answer: probably yes, to all.

What is “Work”?

One principle, many variations . . .

- ◆ We must pay non-exempt employees for all hours they are “required, suffered or permitted to work.”
- ◆ It does not matter if the time was authorized. If employer knew or should have known employee was working, time must be paid.
- ◆ Employers may discipline employees for unauthorized work, but the time still must be paid.
- ◆ There are numerous ways to get in trouble here.

What is “Work”?

◆ Continuous Work Day

- The entire period between the beginning and end of “an employee’s principal activity or activities” including “including all time within that period whether or not the employee engages in work throughout all of that period”
 - This is where we get the “continuous workday” concept. Once you start the clock, there’s generally no stopping except for meal periods.

What is “Work”?

◆ Home-Based Work Expanding The Work Day

- Continuous workday rule can be argued to convert otherwise *unpaid commute* to compensable hours if principal or integral/indispensable work occurs at home.
 - Maintaining employer vehicle
 - Reports, computer work
 - Stocking trucks/vehicle for work
 - Routing, e-mail work, etc.

What is “Work”?

Modern Problems – Modern Strategies

- ◆ What to do:
 - Update policies on overtime and unauthorized work
 - Train managers on what is and isn’t “working time”
 - Limit communication to non-exempts during off-hours
 - Avoid or minimize giving smart phones, laptops, etc. to non-exempts

#9: HOW “ON CALL” IS YOUR ON CALL TIME?

Top 10 Wage and Hour Traps

On-Call Time

- ◆ Can an employee use the on-call time effectively for his or her own purposes?
- ◆ How significant are the restrictions?
 - Excessive geographical restrictions;
 - Frequency of calls;
 - Fixed time limit for responses;
 - Ability to trade on-call responsibilities;
 - Ability to engage in personal activities during call-in time.

#8: NOT ALL TRAVEL TIME IS CREATED EQUAL

Top 10 Wage and Hour Traps

Travel Time

- ◆ Portal to portal \neq compensable
 - Travel to/from work (i.e., normal commute)
 - Walking, riding or traveling to and from the actual place of performance of the principal activity or activities is not work
- ◆ “All in a day’s work” = all paid
- ◆ Report to a different site than usual = unpaid
- ◆ One-day trip to “another city” = paid, except for between home and airport
- ◆ Overnight trip = paid when:
 - During regular hours of work (on any day of week)
 - Employee performing work while travelling
 - Employee driving the car

Emergency Call Back

- ◆ Exception to the general rule that the commute from home to work is not compensable
 - E.g., the employee who has gone home for the day and is called back out must be paid for all travel time (to/from work), as well as the time spent at the job.

#7: TRAINING TIME IS (GENERALLY) PAID TIME

Top 10 Wage and Hour Traps

Training Time

- ◆ **Training and meeting time is included in “hours worked” unless:**
 - 1) Attendance is outside the employee’s regular work hours;
 - 2) Attendance is voluntary;
 - 3) The training or meeting is not directly related to the employee’s job; and
 - 4) The employee does not perform any productive work during such attendance.

#6: LACK OF TIMEKEEPING SAFEGUARDS

Top 10 Wage and Hour Traps

Recording Hours Worked

- ◆ Practices vulnerable to challenge:
 - Paper time sheets (i.e., 8, 8, 8, 8, 8)
 - Record retention
 - Supervisors creating or editing time records
 - What checks and balances are in place?
 - Does your system require a reason for the change?
 - Does the employee have an opportunity to review changes?
 - Time-keeping through exception reporting

Timesheet Don'ts

◆ DO NOT:

- Modify time sheets submitted with unapproved hours;
- Carry “flex” hours into the next work week;
- Let staff work “extra” hours without capturing them on the timesheet;
- Make special exceptions or arrangements;
- Complete the time sheet on the employee's behalf with fixed hours (e.g. 8:30 – 5:00)

#5: WHAT ROUNDS UP MUST ROUND DOWN

Top 10 Wage and Hour Traps

Adventures With Time Clocks: Rounding

Time clocks and Recording Time

- ◆ Time clocks are not mandatory – accuracy is.
- ◆ If clock used, employer may “round” by recording start and stop times to nearest:
 - Five minutes;
 - One-tenth of an hour;
 - Quarter of an hour.
- ◆ Employer must round up and down uniformly. Employer cannot always “round down.”
- ◆ Time and attendance work rules/practices make rounding perilous, and ripe for potential litigation.

#4: PRE- AND POST- SHIFT “WORK”

Top 10 Wage and Hour Traps

Adventures With Time Clocks: Unrecorded Time

- ◆ Opportunities for “work” before and after punching in and out
 - “Integral and indispensable” = paid
 - Donning and doffing? On/off premises?
 - Preparing equipment or otherwise preparing for work?
 - Mandatory security screening?
 - “Boot Time” litigation

**#3: YOU GET A MEAL BREAK,
YOU GET A MEAL BREAK,
EVERYONE GETS A MEAL BREAK**

Top 10 Wage and Hour Traps

Meal Periods

- ◆ New York State requires a meal period of 30 minutes for any non-exempt employee working over 6 hours (NYLL § 162).
 - Breaks of less than 20 minutes = working time
- ◆ To be recognized as a valid meal period:
 - Employee must be completely relieved from duty;
 - Period of relieved time must be 30 minutes or more; and
 - Employee must be able to leave worksite.

Automatic Deductions for Meal Breaks

- ◆ Common practice:
 - Employee supposed to work 8-5 with 1 hour unpaid lunch
 - Employer has employee clock in at 8, and out at 5
 - Time system auto-deducts 1 hour for lunch
- ◆ This is OK . . . **so long as it's 100% accurate(?)**
 - Employee never works through lunch
 - Never shortens lunch
 - Lunch never interrupted by work
- ◆ But remember, it is the Employer's burden to prove accuracy!

Automatic Deductions for Meal Breaks

- ◆ Best practice: contemporaneous punches whenever work starts or stops
- ◆ But, what if that's impractical?
 - Time clock is a 5-minute walk from workstation
 - 200 employees, 1 clock
- ◆ Time Clock – Confirmation Option?

Automatic Deductions for Meal Breaks

- ◆ Next best practice: airtight system for employees to report deviations and get them corrected
 - Policy
 - Sign-offs on policy
 - Training
 - Readily available correction forms
 - Evidence that the policy is actually used and actually works

#2: (MIS)CALCULATING OVERTIME RATES

Top 10 Wage and Hour Traps

Overtime Rate

- ◆ Simple concept - 1.5 times an employee's "regular rate" for all hours worked over 40 in a workweek.
- ◆ Hidden liability – extras on the paycheck above hourly rate or salary

Issue: Calculating Regular Rate

- ◆ Examples of payments included in regular rate
 - Hourly wage
 - Non-discretionary bonuses
 - Commissions
 - Shift differentials
- ◆ Examples of regular rate exclusions
 - Gifts
 - Payments for time not worked (e.g., PTO, vacation, holiday)
 - Reimbursements for expenses
 - Discretionary bonuses
 - Overtime premium payments

Bonuses Included In Overtime

- ◆ Include bonuses that are:
 - Based on productivity
 - Based on hitting individual or company goals
 - Based on attendance
 - Based on safety
 - Based on anything (other than the company's whim)
 - Described in a plan
- ◆ Example: employee is paid \$10/hour, works 50 hours, receives \$200 productivity bonus for week

#1: EXEMPT VS. NON-EXEMPT

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What is an “Exempt” Employee?

- ◆ Employees who are “exempt” are not entitled to overtime
 - High salary not determinative
 - Job title is irrelevant!
 - Salary ≠ exemption
- ◆ Common exemptions include:
 - White collar exemptions:
 - Executive
 - Administrative
 - Professional
 - Outside sales exemption
 - Computer professional exemption
 - 7(i) exemption – sometimes referred to as “commissioned sales person exemption”

Salary Basis

- ◆ Exempt duties + paid salary basis = Exempt employee
- ◆ Must be paid full salary for any week where any work performed
 - Cannot reduce salary for variations in the quality or quantity of the work performed, but need not pay for any workweek in which no work is performed
 - Deductions cannot be made for absences occasioned by the employer or by the operating requirements of the business
- ◆ Permitted deductions:
 - Full day absences for: (i) personal reasons, (ii) sickness or disability if deductions made under a bona fide plan, policy or practice, (iii) FMLA leave (partial day absences also permitted), or (iv) good faith disciplinary suspension for infraction of written workplace conduct rules
 - First/last week of employment, if employee paid pro-rata share of salary for time worked
 - Penalties imposed in good faith for violating safety rules of “major significance”
 - To offset amounts received as payment for jury fees, witness fees or military pay

Executive Employees' Duties Test

- ◆ Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof
- ◆ Customarily and regularly directs the work of two or more other employees; and
- ◆ Has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight

Professional Employees' Duties Test

- ◆ Primary duty is the performance of work requiring:
 - Knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
 - Examples include: accountants, athletic trainers, chefs, dental hygienists, licensed funeral directors and embalmers, nurses, physician assistants and registered or certified medical technologists

OR

- Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Administrative Employees' Duties Test

- ◆ Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- ◆ Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- ◆ Management or general business operations includes:
 - Tax, finance, accounting, auditing, insurance
 - Quality control, research, safety and health
 - Purchasing, procurement
 - Advertising, marketing, PR
 - Personnel management, HR, employee benefits, labor relations
 - Government relations

Administrative Employees Should Meet at Least 2 or 3 of These Factors

- Has authority to formulate, affect, interpret, or implement policies/practices.
- Carries out major assignments in conducting the operations of the business.
- Performs work that affects business operations to a substantial degree, even if employee's assignments are related to a particular segment of the business.
- Has authority to commit Company in matters that have significant financial impact.
- Has authority to waive or deviate from established policies/procedures without prior approval.
- Has authority to negotiate and bind Company on significant matters.
- Provides consultation or expert advice to management.
- Involvement in planning long- or short-term business objectives.
- Investigates and resolves matters of significance on behalf of management.
- Represents Company in handling complaints, arbitrating disputes, or resolving grievances.

Outside Sales Exemption

- ◆ Primary duty of (i) making sales or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- ◆ Customarily and regularly engaged away from the employer's place or places of business
 - Customary and regular = typically done weekly
- ◆ No salary basis requirement!

Computer “Professional” Exemption

- ◆ Primary duty of:
 - ◆ (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; *or*
 - ◆ (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; *or*
 - ◆ (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; *or*
 - ◆ (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills

OR

- ◆ Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field

Highly Compensated Test

- ◆ To meet this test, the employee must:
 - Perform office or non-manual work
 - But does not apply to computer exemption
 - Receive a minimum of \$455 per week
 - Be guaranteed total compensation of at least \$100,00 per year
 - Calculate within one month of end of 52-week period
 - Count base salary, commissions and non-discretionary compensation towards \$100,000 requirement
 - Cannot count “board, lodging or other facilities,” or other fringe benefits (e.g., payments for medical, life, dental insurance or retirement contributions)
 - Customarily and regularly perform one or more exempt duties of an exempt executive, administrative or professional employee

Questions?



Thank You



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