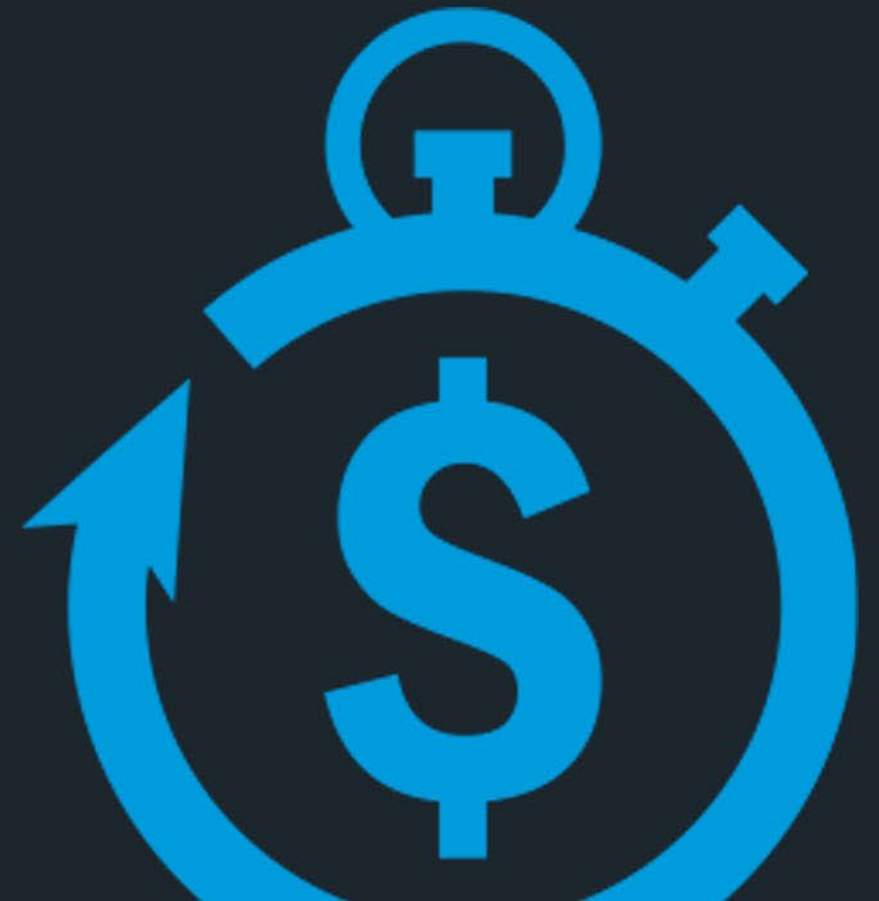


Virtual
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Ten Wage and Hour Mistakes Companies (Still) Make... And How to Avoid Them

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March 26, 2024

Proskauer»



Introduction

- 85 years after the passage of the Fair Labor Standards Act, wage and hour mistakes are prevalent, even by employers with the best intentions and compliance processes in place.
- Why?
 - Wage and hour requirements can be hyper-technical
 - Federal and state laws often differ, and sometimes conflict
 - Longtime/historical practices that are entrenched
 - Lack of historical complaints, leading to complacency
- Why does it matter?
 - Wage and hour mistakes can get expensive...quickly
 - You only need a single plaintiff—often a former or disgruntled employee—for a class action
 - Certain key states have long limitations periods for wage claims (e.g., 6 years in NY and NJ, 4 years in CA)
- To avoid or minimize the impact of litigation, and to minimize unanticipated costs, it is crucial to spot and fix these mistakes **now**.

Agenda

- The “top 10” wage and hour mistakes we (still) see companies regularly make.
- How to avoid them or fix them.

Mistake #1: Weak Time Records



I missed lunch today, but
I'd rather you not edit
my timesheet so I
can take you to
court.



som^{ee}cards
user card

The Problem

- Lack of stringency around recording hours worked.
- Timesheets or other records of hours worked:
 - **Don't** accurately reflect meal periods, breaks, or other “off-duty” hours.
 - **Don't** accurately reflect after-hours, at-home, or other remote work.
 - Are **not** certified by the employee as complete and accurate.
 - Are **not** verified by managers trained on compensable time laws.
 - Are **altered** by managers.

Weak Time Records

- Once you know the laws that apply and what your agreement is with respect to compensation, there are only **two data points** you need to properly calculate pay for non-exempt employees: **hours worked** and **amount of (includable) compensation**.
- You can readily determine how much you paid someone.
- That leaves hours worked.
- So why are so many timesheets lacking in detail or usefulness?

Time Records Are a Crucial Defense Tool

- Complete, accurate, and employee-certified time records are a **central** part of the defense in many wage and hour claims.
 - “Off the clock” claims
 - Minimum wage claims
 - Overtime claims
 - “Gap time” claims
- What better way to defend these claims than the employee’s own certification of the hours they worked (or did not work)?

Time Keeping Requirements: FLSA

- For non-exempt employees, you must record the “hours worked each workday and total hours worked each workweek.”
 - 29 C.F.R. § 516.2(a)(7)
- “Hours worked each workday” means the **total number** of hours worked each day (e.g., 7 hours), not the **exact** hours worked (e.g., 9:15am-12:15pm, 1pm to 5:00pm).
 - [FLSA2004-8NA](#)
- That said, recording actual hours and minutes worked is perfectly acceptable and helpful from an evidentiary standpoint.

State Time Keeping Requirements

- **New York:** for non-exempt employees, each pay statement must include, among other things:
 - The number of regular hours worked
 - The number of overtime hours worked
 - N.Y. Lab. Law § 195(3), 12 NYCRR § 142-2.7
- **California:** for non-exempt employees, each pay statement must include, among other things:
 - The number of hours worked at each hourly rate by the employee
 - Cal. Labor Code § 226(a)(9)

Time Keeping Requirements: Methodology

- Employers may use any timekeeping method they choose.
- For example, they may use a time clock, have a timekeeper keep track of employees' work hours, or have employees manually track their own hours.
- Any timekeeping practice is acceptable as long as it is complete and accurate.
- The ideal timesheet from a defense standpoint is a daily timesheet certified by the employee that contains the start time; time(s) out and in for breaks, meals, and other “off duty” periods; the stop time; and the number of total hours and minutes worked.
- The next best timesheet is a weekly certification along the same lines.

Exception Time Reporting

- “Exception time reporting” is permissible
 - See [USDOL Fact Sheet #21](#)
- “The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.”
 - Best for employees on a fixed schedule from which they seldom vary.

Exception Time Reporting

- Best practices for exception time reporting:
 - There is a clear mechanism for the employee to modify the entry/record on any particular day to reflect actual hours worked;
 - You have informed employees in writing of both the “default”/presumed hours worked and their obligation to modify such presumptions to reflect actual time worked; and
 - There is a certification built into the time entry/reporting process so that employees can confirm that the entries are complete and accurate (including as modified by them).

Using Card Swipes and Log-Ins/Outs

- Using card swipes or building security entry and exit records is imprecise because it can result in overpaying employees for the time they spend getting to their offices or desks, chatting with their colleagues, etc.
- Using computer log-in and log-out records is imprecise because it does not necessarily reflect actual time worked.
- It can be a challenge to compile the data from these methods and translate it into a presentable and comprehensible form.
- It also includes no certification from the employee that the hours are accurate.

Where Timesheets Fall Short

- Employees do not complete their own timesheets.
- Managers unilaterally alter employee timesheets.
- No process in place for legitimate changes.
- No process in place for validating changes.
- No employee verification/acknowledgment of timesheets.
- No contemporaneous timekeeping.
- Timesheets do not include meal and rest periods, after-hours work, or remote work.
- Improper rounding.
- Employers do not retain timesheets for a sufficient amount of time.

Avoiding/Fixing the Problem

- Employees should record their own time.
- Employees who do not work fixed schedules should record their time daily, including meal and rest periods.
- Employers should have a written approval process for time records.
 - Including for changing/altering time records
- Require employees to sign an acknowledgement at the end of the payroll period verifying that the hours reflected on their time reports completely and actually reflect the hours they spent working anywhere, anytime.
- Audit time records periodically.
- Have a written policy to prevent “off-the-clock” work.
- Pay for overtime, even if it is not previously approved.

Mistake #2: Semi-Monthly Pay Averaging



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The Problem

- Some employers that pay on a semi-monthly basis pay on the basis of an **average** number of hours worked, rather than the **actual** number of hours worked.
- This can violate both federal and state wage and hour laws.

Semi-Monthly Pay

- Semi-monthly pay is generally permissible, including in NY and CA, but it presents unique considerations for non-exempt employees.
- Semi-monthly pay periods can cover up to **10, 11, or even 12** working days.
- Notwithstanding this, some employers default to listing 80, 86.67, or some other number of hours worked on each semi-monthly pay statement based on averaging.

Semi-Monthly Pay

- Some states (NY, CA, etc.) require employers to state the **actual number** of straight-time and overtime hours worked on each wage statement.
- For many employers who pay on a semi-monthly basis, the number of hours varies from paycheck to paycheck.
- Failure to state the **actual number** of hours worked in a semi-monthly pay period will violate these laws.

Semi-Monthly Pay and the Regular Rate

- Non-exempt employees must be paid an overtime premium for hours worked over 40 in a workweek, *i.e.* the seven consecutive 24-hour periods, or regularly recurring period of 168 hours, the employer has established as its workweek.
 - There is **no exception** to this requirement for semi-monthly payroll.
- Semi-monthly pay does not affect the regular rate of pay for overtime purposes because the regular rate is **always** calculated on a **workweek** basis, regardless of frequency of pay.

Semi-Monthly Pay and Salaried Employees

- Paying **salaried** non-exempt employees on a semi-monthly basis presents a particular challenge.
- Assume you pay a salaried nonexempt employee an annual salary of \$48,000 by including \$2,000 in each semi-monthly paycheck ($\$48,000 \div 24$).
- Assume you designate the salary to compensate for all hours worked up to 40 in a workweek.
- Some pay periods will cover 80 straight-time hours and others will cover 88 or 96 straight-time hours.
- But the employee will receive the same salary (1/24 of annual salary) in each pay period.
- As a result, in some pay periods, the employee receives **\$2,000 for 80 hours of work** and in other pay periods, the employee receives **\$2,000 for 96 hours of work**. This is fine from a minimum wage standpoint ($\$2,000 \div 96$ is higher than all states' minimum wages).
- But for non-exempt employees with lower salaries, you should confirm, regularly, that the annual salary divided by 24 and then divided by 88 or 96 remains above the minimum wage in all states and cities where the employees work.

Semi-Monthly Pay and Salaried Employees

- The issue concerns minimum wage, and not overtime.
- That some pay periods cover 80 straight-time hours and others cover 88 or 96 straight-time hours does not affect the overtime calculation because the regular rate of pay and overtime are calculated on a **workweek** basis, and not on a **pay period** basis.
 - In every workweek, the regular rate is the weekly salary (plus any additional includable compensation) divided by the number of hours that the salary is ***intended to compensate***.
- The regular rate can therefore **vary** from week to week.

Avoiding/Fixing the Problem

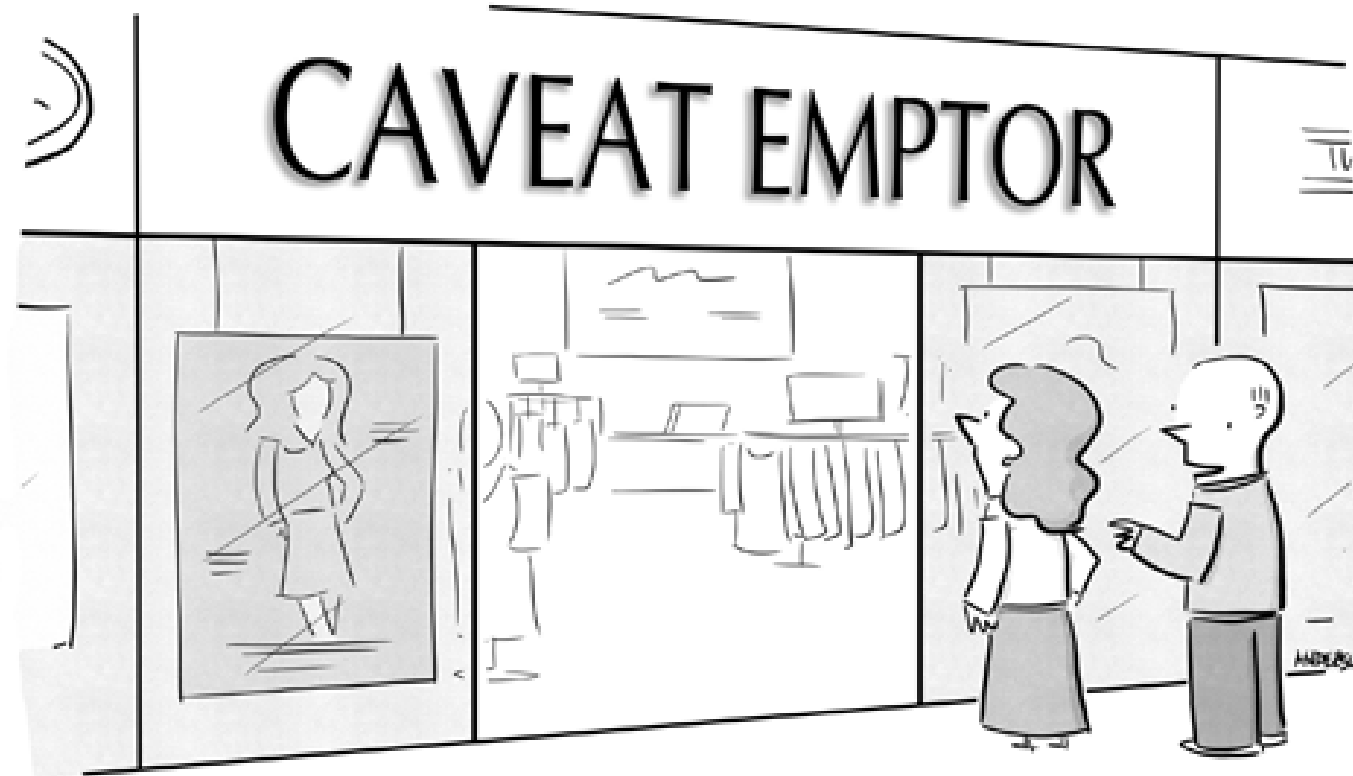
- Record **actual**—not average or assumed—hours on each semi-monthly pay statement.
- If your employees are salaried, make sure their semi-monthly pay in periods with 11 or 12 working days is sufficient to cover the minimum wage.
- Make sure you calculate the regular rate of pay and overtime on a **workweek** basis, regardless of whether you pay weekly, bi-weekly, semi-monthly, or on some other basis.
- Electronic payroll systems can be easily programmed to track and compute overtime in semi-monthly pay periods.

Consider Switching to a Bi-Weekly Payroll

- In a semi-monthly payroll, almost all pay periods include **partial workweeks**.
 - Example: The workweek is April 12-18. You pay on the 15th and last day of each month. The first payroll in April would include, at best, the partial workweek April 12-15, and the second payroll in April would include the partial workweek April 16-18.
- But in a bi-weekly payroll, you can ensure that all pay periods are comprised of two full workweeks.
 - Example: The workweek is Monday through Sunday. You pay every other Friday, for the two workweeks that ended the prior Sunday.

Mistake #3: Not Focusing on Wage and Hour Due Diligence in Acquisitions and Mergers





“It sounds fancy, and we don’t have to worry about refunds.”

The Problem: Weak Due Diligence on Wage and Hour Issues

- When you're acquiring or merging with another employer, or when you are an investor or lender in such a transaction, are you properly assessing the potential legal risks associated with wage and hour problems?
 - Have you examined whether employees are **properly classified** as exempt or non-exempt?
 - Have you examined whether the **independent contractor/1099 relationships** are bona fide?
 - Have you examined whether overtime is being properly calculated?

The Problem: Weak Due Diligence on Wage and Hour Issues

- Have you examined the target company's:
 - Offer letters?
 - At-hire wage notices?
 - Pay statements/stubs?
 - Timesheets?
 - Overtime policies?
 - Pay practices?
 - Commission plans?
 - Other compensation plans?

Avoiding/Fixing the Problem

- Know what you're buying, merging with, investing in, or lending to.
- Focus on wage and hour issues—which are particularly susceptible to class action risk and governmental audits—as much as other traditional labor and employment due diligence considerations (e.g., pending or threatened litigation, union issues, benefits issues, etc.)

Mistake #4: Creating “Gap Time” Exposure for Salaried Non-Exempt Employees





*“Theoretically, your shift ended.
Now, let’s talk reality...”*

The Problem

- Assume a non-exempt employee receives a salary and that you have told them the regular workweek is 35 hours.
- Assume that there is no offer letter, employment contract, policy, or other writing that states that the salary is intended to cover all hours worked up to 40 (or some higher number) in each workweek.
- The employee occasionally works more than 35 hours a week and receives no additional pay.
- The employer is exposed to a “gap time” claim.

“Gap Time” Claims

- “Gap time” claims are claims for unpaid straight time.
- Common issue for salaried non-exempt employees.
- Typically arises when employers do not make it clear that a non-exempt employee’s salary is intended to cover up to 40 (or more) hours of work per workweek.
- In the example above, the employee has a claim for straight-time pay for any hours worked between 35 and 40 in the workweek.

“Gap Time” Claims Under the FLSA

- The Second Circuit has repeatedly held that the FLSA does not provide a cause of action for “gap time” (claims for hours worked below 40), unless the employee has not received at least the minimum wage for all hours worked in any given workweek.
 - *Nakahata v. New York Presbyterian Hospital* (2d. Cir. 2013)
 - *Lundy v. Catholic Health System of Long Island* (2d. Cir. 2013)

“Gap Time” Claims Under the FLSA

- In weeks in which overtime work is performed, however, the FLSA regulations suggest that a “gap time” claim may exist.
 - See 29 C.F.R. § 778.315 (“Th[e] extra compensation for ... overtime work under the [FLSA] cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours ... has been paid.”)
 - See also 29 C.F.R. §§ 778.317, 322
- The Second Circuit has held that these regulations go beyond the FLSA and are not entitled to deference.

“Gap Time” Claims Under State Law

- State law claims for “gap time” pay clearly exist.
 - N.Y. Lab. Law § 663 allows an employee to sue for minimum wage for all hours worked.
 - N.Y. Lab. Law § 191 requires timely payment of wages that are owed (other than for bona fide executive, administrative, and professional employees who earn more than a threshold amount per week).
 - A common law contract law claim could arise when an employee is not paid for certain hours that he or she alleges were agreed to be paid for.

“Gap Time” Claims For Exempt Employees?

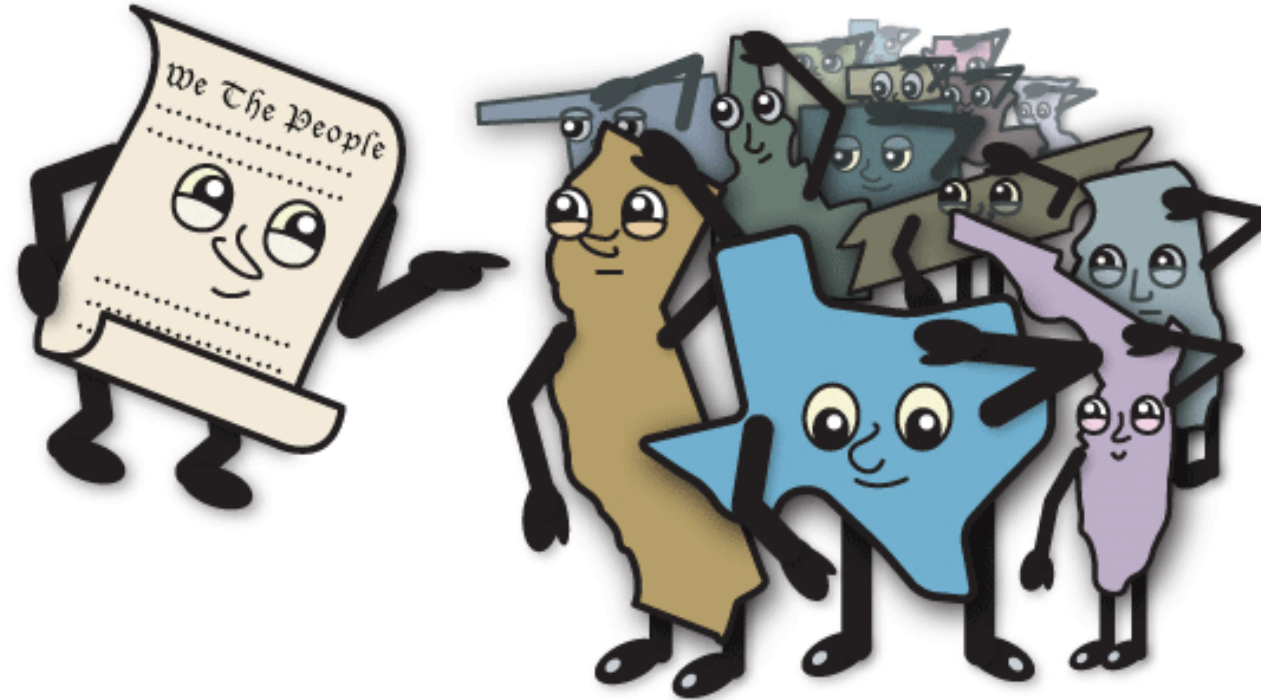
- If an exempt employee can prove that their salary was intended to compensate for something other than all hours worked in a workweek, nothing would prohibit the employee from alleging a “gap time” claim under a state statute or a common law contract theory.

Avoiding/Fixing the Problem

- Make clear in offer letters to **salaried non-exempt employees** that their salaries are intended to compensate them for all hours worked up to 40 in each workweek.
 - Or, in states that permit such an arrangement, that their salaries are intended to compensate them for all hours worked up to some higher fixed number, or for all hours worked regardless of how many (the “fluctuating workweek” method of pay).
- Make clear in offer letters to **exempt employees** that their salaries are intended to compensate them for all hours worked.

Mistake #5: Ignoring State Law Nuances





The Problem

- Failure to take into account state law nuances that impose greater or different obligations on employers than the FLSA.
- More and more wage and hour class actions are driven by state law claims, which can provide longer statutes of limitations and broader remedies.

No Preemption of State or Local Wage Laws

- The FLSA sets a **floor**—not a ceiling—for minimum wage and overtime pay.
 - “No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum work week lower than the maximum workweek established under [the FLSA].”
 - 29 U.S.C. § 218(a)

No Preemption of State or Local Wage Laws

- The FLSA does not purport to preempt state or local laws governing other wage and hour matters:
 - Timing of pay
 - Frequency of pay
 - Wage deductions
 - Wage notice and wage statement laws
 - Reporting/show-up/call-in pay
 - Split shift/spread of hours laws

Federal Overtime Exemptions Not Recognized By Certain State Laws

- Some states **do not recognize** certain exemptions available under federal law.
- Examples:
 - The “highly compensated employee” exemption (29 C.F.R. § 541.601)
 - No equivalent under NY or CA law
 - The “computer employee” exemption (29 C.F.R. § 541.400-02)
 - No equivalent under most state laws
 - The “motor carrier exemption” (29 U.S.C. § 13(b)(1))
 - No equivalent under NY law

State Law Nuances: Example

- Creative Professional Exemption
 - Federal: An employee who (i) earns at least \$684 per week and (ii) whose primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
 - New York: No salary basis test for professionals.
 - California: More than 50% of time must be spent on exempt work and monthly salary must not be less than two times the state minimum wage for the first 40 hours of employment each week.

State Law Nuances: Examples

- Quantitative versus qualitative duties test for exemption
 - Under federal regulations, “**primary duty**” means the principal, main or most important duty. The definition takes into account the character of the job as a whole.
 - In contrast, some states (*e.g.*, **California**) require an employee to spend more than a certain **percentage** of their time performing exempt work to qualify for exemption.
- Outside Sales Exemption
 - Federal law considers time spent in certain “**inside**” activities that are incidental to or in furtherance of outside sales activities as exempt work time.
 - California only counts time spent **outside** the workplace towards the exemption.

Avoiding/Fixing the Problem

- Employers must be **intimately familiar** with the state and local wage and hour laws and rules in each location where they have employees.
- Pay policies and practices must take all such laws and rules into account.
- Employers should focus not only on locations where they have offices or facilities, but also on locations where **remote workers** perform services.

Mistake #6: Not Taking Unemployment Claims Seriously (Enough)





New York State
Department of Labor
PO BOX 15130
ALBANY NY 12212-5130

LO400 (09-13)

Date Mailed:	04/04/2017
Employer#:	
Claimant SS#:	

Use black or blue ink for corrections and/or updates to this notice.

**Unemployment Insurance
Notice of Potential Charges**
Part 1 of 2

If the above address is incorrect, refer to the reverse side of this notice for assistance.

Reason for this Notice	The claimant designated below has filed a claim for Unemployment Insurance Benefits, naming you as a former employer. Please review the information below and follow the instructions for submitting changes. For assistance with this notice, see the reverse side "Guide to Understanding the Notice of Potential Charges."			
Step 1 Claimant Verification	If the claimant was never employed or is currently employed full time by you, call NYS DOL at 888-890-5090			
	Claimant:	Social Security #: Claim Effective / Start Date: Benefit Year Ending Date:		
	Workplace: NEW YORK CITY(1099 WAGES)			
Step 2 Claimant Gross Wages Verification	Review the information below and make any necessary corrections. Any changes may affect your potential charges.			
	QUARTER START - END	GROSS WAGES	CORRECTION(S)	REASON FOR CORRECTION(S)
	01/01/2016 - 03/31/2016	\$.00	\$ _____	_____
	04/01/2016 - 06/30/2016	\$.00	\$ _____	_____
	07/01/2016 - 09/30/2016	\$.00	\$ _____	_____
	10/01/2016 - 12/31/2016	\$.00	\$ _____	_____
	<small>(UN) or (NC) Indicates that you are not liable for the charges associated with those wages. If a final determination pertaining to this claimant and this separation was already issued in your favor, an updated Notice of Potential Charges may be issued. For questions about this notice, please call 888-890-5090.</small>			
Step 3 Employer's Potential Charges	WEEKS	POTENTIAL WEEKLY CHARGES	TOTALS	<small>NOTE: Generally, if you were the claimant's last employer, you will be charged the full rate for weeks 1 - 7. The charges for weeks 8 - 26 are based upon the percentage of base period wages paid by your company, relative to wages paid by all other employers in the period. In some cases, the entire claim may be prorated. If you are the last employer and paid total wages equal to or less than six times the potential weekly charges listed for Weeks 1 - 7, see instructions on the reverse.</small>
	1 thru 7	\$.00	\$.00	
	8 thru 26	\$.00	\$.00	
	Total Maximum Potential Charges:		\$.00	
Step 4 Certification	If you have <u>not</u> made changes, please do <u>not</u> return this notice. Retain for your records. If you have made changes to Step 2, complete the information below and return immediately.			
	Print Your Name _____		Title _____	E-mail Address _____
	Signature Required _____		Area Code _____ Telephone Number _____	Extension _____ Date _____
Step 5 Supporting Documentation and Return Instructions	Submit all supporting documentation on 8 1/2 x 11 paper. Write the claimant's name and social security number on each attached page. To submit this notice, select from the options below.			
	FAX: 518-402-6175	OR MAIL: New York State Department of Labor PO BOX 15130 ALBANY NY 12212-5130		
	This notice is your cover page. Indicate total # of pages _____			

If you feel that the claimant should not receive Unemployment Benefits, see Notice of Protest, Part 2



For assistance with job orders and hiring incentives. Call 1-800-447-3992



For additional information visit our website: www.labor.ny.gov



For questions about this notice, Call 888-890-5090

The Problem

- Not being sufficiently strategic about unemployment insurance claims and/or not understanding the broader implications.

Unemployment Claims: Focus on New York

- The problem arises when an individual you have paid on a 1099 basis makes a claim for unemployment insurance benefits.
- If the NYSDOL determines that the claimant is an employee, it will ask you to pay back taxes for the employee (and **similarly situated others**) going back as far as **three years**.
- You have the option to request a hearing before an ALJ to contest the determination.
- Should you contest the determination?

Unemployment Claims

- If you don't contest, you will be expected to make back contributions (with interest) and file NYS Forms 45-X (Amended Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return) for the claimant and "similarly situated" individuals for up to the prior three years.
- If this is a one-off situation and your merits arguments are not strong, the most cost-efficient strategy may be to not contest the determination.

Unemployment Claims

- If this is **not** a one-off situation—*e.g.*, you have a number of similarly situated individuals you have paid on a 1099 basis—you may decide that you must contest the determination to defend your classification, avoid making a significant back payment, and/or completely changing your business model.
- If you contest, you will get a notice of hearing and you will have the opportunity to challenge the determination at an evidentiary hearing before an ALJ.

Unemployment Claims

- If you decide to go to an ALJ hearing, you should be prepared to appeal if you lose (to the Unemployment Insurance Appeal Board (UIAB) and possibly to the Appellate Division or Court of Appeals).
- If you're **not** prepared to take an appeal to the UIAB (and possibly the courts), you shouldn't request an ALJ hearing, unless your goal is simply to delay the eventual payment.
- **Why?** Because once you go to an ALJ hearing and lose, the NYSDOL will consider the decision binding and will apply it to future claims from (arguably) similarly situated individuals.

Unemployment Claims

- And once you have an adverse ALJ decision, the NYSDOL will almost always ask you to make back contributions for all similarly situated individuals.
- And once you have an adverse ALJ decision, you are at increased risk of a broader audit and external claims.
- If you choose **not** to appeal to the UIAB (or if you lose at the UIAB and choose not to appeal to the courts), you'd have to be prepared to contribute for all similarly situated individuals going back up to three years.

Unemployment Claims

- And you would have to consider treating the individuals as employees going forward unless you want to be exposed to the same misclassification liability in the future.
- If you lose before the ALJ, you should be prepared to appeal to the UIAB and give it your best shot.
- Worst case scenario: You have to make back contributions plus interest. But from an agency precedent standpoint, there's not much difference between an adverse ALJ decision and an adverse UIAB decision.

Avoiding/Fixing the Problem

- Expect to lose at the ALJ and UIAB stages unless the facts are terrific in your favor.
- If you have an adverse determination, there's no real downside to requesting a hearing.
- Once you request a hearing, you can then gather the best facts (both with respect to the claimant and any other workers the NYSDOL may try to claim are similarly situated).

Avoiding/Fixing the Problem

- After you have requested a hearing, you can try to broker a settlement with the NYSDOL, either just for the complainant or for some limited group of concededly similarly situated individuals.
- You can negotiate to exclude workers if you can really distinguish them.
- The NYSDOL is most persuaded by evidence of worker independence (e.g., an established independent business, a website, invoices, a corporate name/form, etc.).

Avoiding/Fixing the Problem

- If you can settle pre-hearing, you wouldn't concede misclassification—and you may be able to settle for the individual claimant or a narrow group of “similarly situated” workers.
- You would make it clear, in your correspondence with the NYSDOL, that while you don't agree that the workers subject to the settlement are employees, you will withdraw your request for a hearing and make back contributions to avoid the time, expense and disruption of going to a hearing.

Avoiding/Fixing the Problem

- Bottom line: In most cases, unless you are certain that your facts will stand up and support a finding of an independent contractor relationship at a hearing or on appeal, the best strategy is to request a hearing and try to settle. You can settle most cases pre-hearing without risking any adverse precedent, even if you have to concede some similarly situated workers for purposes of back contributions.
- Be as strategic with unemployment claims from 1099 workers as you would with any other employment litigation threat.

Mistake #7: Having Job Descriptions That Undermine Exempt Status





The Problem

- The position is an exempt one, but the job description lists a number of non-exempt tasks and leaves open the question of whether the primary duty is exempt.

Job Descriptions and Exempt Status

- Job descriptions can hurt more than they can help when it comes to defending a misclassification claim.
- A job description will **not** make an employee exempt if his or her actual duties do not meet the federal and state requirements for exemption.
- However, a job description that suggests that non-exempt duties are primary will almost certainly be viewed by a plaintiff, an agency, or a court as evidence of actual job duties and a quasi-admission against interest.

JD Words That Suggest Non-Exempt Duties

- Support
- Coordinate
- Assist
- Execute
- Escalate
- Maintain
- Compile
- Track
- “Point of contact”
- “Other duties as assigned”

Avoiding/Fixing the Problem

- A good job description:
 - Is accurate
 - Is specific
 - Is realistic
 - Supports the exemption(s) within which the employee falls
 - Emphasizes the employee's primary duty(ies)
 - Is periodically reviewed and updated to reflect reality
- If the role is exempt, make sure the job description supports the exemption.

Mistake #8: Regular Rate Miscalculation





The Problem

- Failure to include certain types of remuneration that must be included in the regular rate of pay, resulting in underpayment of overtime pay.
- Private claims targeting regular rate miscalculation are becoming increasingly prevalent and are particularly suitable to class and collective action treatment.

Regular Rate Miscalculation Claims Arise From...

- Bonuses
 - 29 U.S.C. § 207(e)(3)(a); 29 C.F.R. §§ 778.208-12
- Production and other incentives
- Commissions
 - 29 C.F.R. § 778.118-19
- Shift differentials and hazard pay
 - 29 C.F.R. § 778.207(b)
- Non-cash compensation
 - 29 C.F.R. § 778.116; 29 C.F.R. Part 531

Avoiding/Fixing the Problem

- Understand what must be **included** and what may be **excluded** from the regular rate of pay.
- Understand the proper way to calculate the regular rate for employees paid on a **salaried or other non-hourly basis**.
- Make sure your payroll provider/administrator is following the rules.
- **Check your math!**

Mistake #9: Engaging Employees As “Contractors”





The Problem

- Private class actions and government agency investigations continue to challenge independent contractor classifications.
- Many companies have not properly evaluated their **non-W-2 relationships** with individuals.
- In many companies, there is **no central process** for engaging contractors or evaluating the risks of such relationships, and therefore **practices and risk vary widely** even within a single organization.
- Companies are not being sufficiently strategic about these relationships.

The New Federal IC Classification Rule

- The USDOL's new classification rule, effective March 11, 2024, reverses course from the Trump-era streamlined rule (which focused only two "core" factors) and the returns the agency's position to its historical roots.
- The DOL will once again consider six factors as part of a "totality of the circumstances" test to examine the "economic reality" of the relationship.
- Language in the new rule clearly targets the gig/on-demand industry.

Contractor Misclassification

- Signs your contractor may not actually be a contractor:
 - Is not in a demonstrable independently-established business serving the public
 - Performs work that is integral to the company's business
 - Is actively supervised by a manager employed by the company
 - Supervises company employees
 - Performs services for the company for an extended period of time
 - Performs services exclusively for the company
 - Regularly performs services at company facilities

Contractor Misclassification

- Signs your contractor may not actually be a contractor:
 - Is restricted from performing work for other businesses
 - Performs work that company employees also perform
 - Has unnecessarily broad access to the company's facilities and systems
 - Wears an identification badge/company uniform
 - Has a desk at the company's facility
 - Has a company email address/phone/business card
 - Attends company functions and events, or otherwise is integrated into the workforce

Avoiding/Fixing the Problem

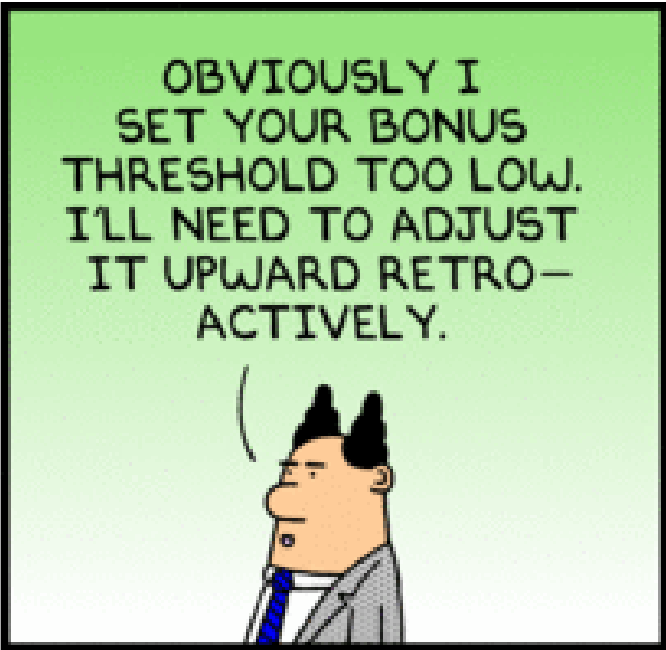
- Understand **where and how** your company uses non-W-2 labor.
- **Audit** your existing 1099 relationships, particularly with individuals and single-member LLCs.
- Harmonize and **centralize** your contractor engagement process.
- Know **before** an individual performs any services for your company whether you can reasonably defend their classification.
- Ensure that your **agreements** with putative contractors do not undermine your classification.
- Train managers and others who may be in a position to engage 1099 labor directly about the risks of misclassification.

Mistake #10: Missing Provisions In Compensation Plans and Policies





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The Problem

- Missing or ambiguous provisions in compensation plans can create unwanted exposure to wage claims.

Crucial Provisions in Compensation Plans

- In states that permit pre-earning adjustments to incentive compensation, you **must** include clear language confirming that the compensation will not be considered earned or payable unless and until all conditions to vesting or earning have been satisfied.
- You must make clear that such compensation is considered unearned and subject to reduction or adjustment (*e.g.*, for refunds, charge-backs, fees, failure of client to pay, etc.) before it becomes earned and payable.

Crucial Provisions in Compensation Plans

- The seminal case on the issue of pre-earning adjustments to compensation in New York is *Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609 (2008).
- In *Pachter*, the Court of Appeals confirmed that employer and employee are free to define when a commission or incentive compensation is “earned” under the terms of a written commission or incentive plan and that adjustments made to commissions or incentives before such time are not considered deductions to “wages” under the Labor Law.

Crucial Provisions in Compensation Plans

- If employment through a certain date (e.g., end-of-year, scheduled payout date, etc.) is a condition to receiving certain compensation, you should make that clear.
 - Permitted by *Truelove v. Northeast Capital*, 95 N.Y.2d 220 (2000), *Welland v. Citigroup, Inc.*, 2003 WL 22973574 (S.D.N.Y. Dec. 17, 2003) aff'd, 116 F. App'x 321 (2d Cir. 2004).
- If you intend compensation to be discretionary, you should make clear that it is not guaranteed and that it is subject to the company's sole and absolute discretion.

Crucial Provisions in Compensation Plans

- You **must** make perfectly clear what happens to unpaid compensation upon termination of employment, particularly if any rights to further or certain compensation will be cut off.
- Example:
 - “If Employee’s employment with the Company ends for any reason, Employee will not be entitled to a Commission for a transaction unless the transaction has closed and funded and the Company’s fee has cleared in the Company’s bank account within 30 days of Employee’s last day of employment with the Company.”

Crucial Provisions in Compensation Plans

- Draw provisions should make clear that the draw is an unearned advance on commissions/awards.
- Example:
 - “The Company will provide Employee with a \$_____ monthly recoverable draw against Commissions. Employee will only receive Commissions to the extent that they exceed any draw paid to him to date. The draw will be considered an advance on anticipated Commission earnings and will be considered earned only when such Commissions are earned in accordance with Section x, above.”

Crucial Provisions in Policies

- If you want the unilateral right to amend the plan (especially in the middle of a plan year), you should clearly reserve that right.
- Forfeiture, claw back, and recapture provisions should clearly set forth the Company's rights.
- Applicable agreements or plan documents should make clear that compensation and awards subject to claw back are not considered earned or vested until the expiration of any claw back period.

Avoid Inconsistent/Untethered Provisions

- Make sure any promised amounts are “subject to the earning provisions set forth in Section ___, below, and otherwise subject to the terms and conditions of this plan/agreement].
- Compensation plans and agreements too frequently make what appear to be unconditional promises that the employee will receive certain amounts, and only at the end of the document refer for the first time to a laundry list of conditions precedent to earning and receiving such amounts.

Ten Wage and Hour Mistakes Companies (Still) Make... And How to Avoid Them

Allan S. Bloom
Rachel S. Phillion

March 26, 2024

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