

Business Smarts

Poster Perfect

What your lawyer wishes you understood about the Fair Labor Standards Act

Washington Business Journal - April 14, 2006 by Lucy Webb Staff Writer

Attorney Jonathan Greenbaum wasn't seeing too many employment class-action suits locally until about two years ago. Since then, his cases have doubled.

In 2004, there was some revision of the Fair Labor Standards Act, which theoretically made compliance easier. But, says the partner at Nixon Peabody in D.C., the same issues still exist. And with the last downturn, when tech employees who'd been working huge numbers of hours were suddenly getting laid off, there came an awareness that overtime pay could still be forthcoming. Recently, Hope Eastman, a Business Smarts columnist, wrote about FLSA and tackled the technical nuts-and-bolts. (If you haven't already, read it. Go to www.bizjournals.com/washington and search for "FLSA" to find it, or just go back and look at Page 48 of your March 24 WBJ.)

But we wanted to know what you're doing wrong. We called employment lawyers and asked what is most crucial for you to understand, what's missing in their clients' understanding of FLSA.

This is not comprehensive—it's just to give you something to think about. Got your hand on the phone yet to call your lawyer? No? Keep reading.

You're probably not in compliance. Lawyers sometimes address this issue with clients because of a requested audit and sometimes because there's litigation involved. But either way, the FLSA is a cumbersome law, one that it's probably high time you revisited. Find the full text at www.dol.gov/esa/regs/statutes/whd/FairLaborStandAct.pdf.

"You can use common sense and good business judgment and still get this wrong," says Elizabeth Lewis, a partner with Cooley Godward in Reston.

"In compliance" is in the eye of the beholder. Part of why you probably aren't in compliance is that some of the terms are poorly defined, and courts have ruled in different ways

regarding similar jobs and whether they're exempt. That said, you have no excuse for not doing your hardest to get it right. Good faith efforts to follow the law are not perfect defense against lawsuits, but they will take you a lot further than not examining your practices at all.

You really need to talk to your lawyer about this. Why? Because this is too complicated a law to handle without help, or by reading a newspaper article. Also, if you do run into trouble, your lawyer can help you get out of it with minimum damage. And, says Jack Garson, founding principal of Garson Claxton your lawyer can help you come up with a transition plan that solves more problems than it creates. The last thing you want to do is open yourself to additional lawsuits by just forking over the cash for one.

Don't have an attorney who can help you with these issues? Get referrals. Ask other employers who they've been happy with. You want someone with knowledge of the law, good business sense and attention to detail.

People you think are exempt likely aren't. For starters, "salaried" doesn't automatically mean "exempt." You cannot pay your employees a salary and decide they're exempt. If an employee doesn't meet all the

standards for exemption, including both salary and how the person's time is spent, you can still get yourself in trouble.

The confusion comes up a lot with computer professionals, says Amy Bess, a partner in the D.C. office of Sonnenschein Nath & Rosenthal. Not all information-technology employees are exempt under the "computer employee" exemption. In fact, most aren't, unless their primary duties are high-level tasks.

Managers or supervisors who also do production work are also a confusion-ripe area. Unless managers are spending most of their time managing, they're not exempt.

Some bonuses count. If you're giving regular, predictable, performance-related bonuses, they may have to count in the time-and-a-half you're paying for overtime.

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Your employees can't opt out. Employees, especially employees with more education than a high school diploma, often feel insulted by having to fill out a time sheet.

Some nonexempt employees will voluntarily work more than 40 hours a week and say they don't care about overtime.

It doesn't work like that.

It's the employer's responsibility to make sure workers are paid the way they should be.

You can't vary your FLSA compliance by agreement with the employee, according to Lewis. Except, she says, that sometimes you can, if an employee's work week fluctuates both above and below 40 hours, and you have a Belo plan agreement with the employee that he or she will be paid for a consistent number of hours.

Comp time isn't real. That 40 hours a week is the standard. You can permit an employee to play around with those hours within a week, with four 10-hour days, or let someone knock off early and come in early the next day, as long as it's the same work week.

But you can't let comp time accumulate, and you can't let someone work two extra hours on Friday and come in late Monday in a Monday-Friday workweek.

That said, you can ruin an exemption by docking pay (or time) for an exempt employee for a partial day missed. If an exempt employee is missing a lot of partial days, you can handle it as a disciplinary issue, Garson says. But you can't pro-rate the person's pay.

And, says Lewis, if people work unauthorized overtime, you still have to pay them, unless you have told them not to.

The act is outdated, which doesn't mean you don't have to follow it. The law's whole name is The Fair Labor Standards

Act of 1938. There have been updates, but it still assumes an agrarian/manufacturing model of work, which, often doesn't apply.

Knowing FLSA isn't enough. FLSA is federal. But you need to be in compliance with every jurisdiction where you have employees. So if you're based in Maryland, but have someone telecommuting from Virginia, you need to pay attention to Virginia laws and minimum wage standards, too. Maryland, D.C. and Virginia all have exceptions to the federal exemptions.

And if you have employees in California, make sure your lawyer knows what he or she is doing.

California seems to be the first example lawyers think of when they're looking for a state with a lot of labor liability.

If you are sued over this, you'll lose. Unlike discrimination or harassment lawsuits, which are hard to prove, FLSA lawsuits are actually fairly easy for employees to win, because the burden of all the paperwork and all the compliance is on the employer, and because most employers are arguably not in compliance.

In fact, plaintiffs' attorneys will dissuade ex-employees from a harassment or

discrimination suit in favor of an FLSA suit, which can very quickly become a class-action suit.

And if you're the employer at fault, you are personally and individually liable for your mistakes, Lewis says.

If a case can be made that you willfully violated FLSA, double damages can be awarded. Doing an audit, and then following the recommendations of the auditor, will help to show you're acting in good faith.

Cases like this, unlike other employment cases, can't just be settled, unless it's under the auspices of the federal Department of Labor or its state equivalent, Lewis says.

e-mail: lwebb@bizjournals.com phone: 703/816-0334

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