

2011's biggest wage-and-hour issues—and what to do about them

This year is shaping up to be a tough one for organizations worried about employment law issues. So far, the U.S. Supreme Court has decided three big employment law cases—and every time, ruled in favor of employees.

The latest—*Kasten v. Saint-Gobain*—expanded employer retaliation liability under the federal Fair Labor Standards Act (FLSA). (See “Supreme Court: Oral complaints have retaliation protection, too” on page 1.)

The FLSA forbids employers from retaliating against workers because they’ve “filed any complaint” about their pay, perks or working conditions. In *Kasten*, the Supreme Court ruled that such complaints don’t even need to be in writing to be considered “protected activity.”

But that’s not this year’s only pressing wage-and-hour problem. Pay attention to these other issues:

Accounting for meal breaks

New York State law grants a meal period of at least 30 minutes to employees who work shifts longer than six hours. Penalties for noncompliance start at \$1,000 per offense and increase with each infraction.

In addition, if an employer automatically deducts meal periods from working time, and the deductions do not accurately reflect the meal periods taken, employees may get paid too little for the hours they do work. That can cause even greater legal exposure for employers.

What to do: Develop and enforce a meal period policy, requiring employees to take their breaks, with no exceptions. Require employees to leave the work area and prohibit them from performing any work during meal breaks.

If employees’ meal periods are frequently interrupted, pay them for the entire meal period. Be sure to maintain accurate records demonstrating

that you are complying with meal period obligations.

If you automatically deduct for meal periods, establish a policy that notifies employees of this practice. Develop a mechanism for employees to report when they have worked during a meal period, and require employees and supervisors to certify the accuracy of time records. Train supervisors on the legal obligations associated with meal periods.

Job status misclassification

FLSA litigation now outpaces discrimination suits. The U.S. Department of Labor is stepping up enforcement. And New York’s recently enacted Wage Theft Prevention Act took effect in April 2011. All of those developments make overtime compliance essential, and that’s a function of employees’ exempt/nonexempt status.

What to do: Before classifying a position as exempt, make sure you have satisfied the FLSA’s duties test, salary-basis test and salary-level test. Many employers give little thought to exempt classifications. That’s a mistake. Review all positions currently classified as exempt and ensure they meet the tests.

Another reason to regularly review job descriptions: Jobs change—especially in this economic climate where employees are asked to do more with less.

Job descriptions should reflect the reality on the ground—that is, what employees actually do today. Additional job duties and responsibilities may mean, for example, that a position could be reclassified as exempt. Likewise, a sharp drop in time spent on management tasks along with an increase in basic work may mean an exempt employee should be reclassified as hourly.

If you discover you have misclassified a position, consult your attorney immediately.

Contractor misclassification

Misclassifying an employee as an independent contractor can expose you to liability in many different realms: unemployment insurance, workers’ compensation, temporary disability, Social Security withholding and income tax withholding, not to mention minimum wage and overtime liability.

The DOL has identified combating employee misclassification as a priority in 2011.

What to do: Review your relationship with any worker identified as an independent contractor. In doing so, pay particular attention to:

- Whether the individual is in the business of providing these services
- The duties performed
- The control exercised over the work performed
- The method of payment
- How payments are reported.

Document contractor relationships with written agreements that accurately reflect the relationship between you and workers. Have your attorney review all agreements.

Other wage-and-hour concerns

Be mindful of limits on deductions from wages (e.g., overpayment of wages, debts to the employer), the need to pay nonexempt employees for all hours worked (including those worked remotely, such as via home e-mail or smartphones) and the proper way to calculate employees’ regular rates of pay for overtime purposes.

What to do: Review your wage-and-hour practices, and work with your attorney to develop appropriate policies and guidance on each of these subjects.

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