HUMAN RESOURCE ASSOCIATES
HR Consultants to Management

PERSONNEL NOTEBOOK

For Your Most Important Resource

Top 5 Employment Regulation Mistakes Made by Small Companies

The U.S. Department of Labor (DOL) now has more than 8,000 labor investigators and its 2013 budget calls for hiring 1,200 more. Of course, it's looking for and finding all forms of violations of the employment regulations, but its focus is mostly on the Federal Labor Standards Act (FLSA). The DOL estimates that 72 percent of all employers are in violation of the FLSA.

Small companies are identified in most government publications as companies with less than 500 employees. However, in practice they view small companies as those with fewer than 100. Judging from the public reports as well as the HR Hot-Line calls we receive, the following are the top five regulation mistakes being made by small companies and includes a brief and condensed explanation of each.

1. Exempt vs. Nonexempt

It's about who gets paid overtime and who doesn't. Basically, the FLSA says that all U.S. workers must be paid overtime if they work more than 40 hours in one week. However, the regulation then allows four categories of workers to be exempt from those laws (hence the term "exempts"): executives, professionals, administrators, and sales people. The employee's title and whether or not he or she wears a white collar has little to do with this status. It's all about the type of work, the authority, and the freedom to act that mostly determines who is exempt and who isn't.

Executives: Supervises two or more employees; manages some significant function with relative freedom.

Professionals: One of the recognized degreed professions (doctors, attorneys, accountants, engineers, etc.).

Administrators: Oversees budgeting, quality control, accounting, taxes, procurement, and human resources with significant freedom and authority.

Sales People (outside sales): Not retail or inside sales but primarily engaged away from the employer's place of business.

Some computer types, such as systems analysts, software engineers, programmers etc, are also classified as exempt, but not data entry or basic computer operators.

All four categories must earn at least $455 per week.

If the DOL finds that you have misclassified an employee as exempt (and thereby avoided paying overtime) it will normally require you to pay all that back overtime for the previous two years (in some case three years) at one-and-one-half (1½) times the employee's calculated hourly rate of pay plus penalties. How does the DOL know how many overtime hours the employee worked during those years? They ask the employee. Unless you have records to show the actual hours, the employee's estimate will be accepted.

Also, an exempt (salaried) employee may not be docked for missing hours in a day. If the employee works one hour in the week he/she must be paid for the entire week (although there are some unique exceptions to this rule).

If the DOL finds you in violation of this rule, it normally will reclassify the worker as nonexempt (hourly paid) and do the same for all other employees doing that job.

2. Independent Contractor or Employee

Often, an employer will consider having an existing employee become an independent contractor and enter into a contract to do the same work he was doing previously. Why would an employer do that? By doing this, the employer doesn't have to pay that employee's Social Security, IRS, unemployment compensation, workers' compensation, employee benefits, holidays, etc. And, there are no labor laws or fear of Equal Employment Opportunity Commission (EEOC) charges on contractors. It's not just the DOL that's concerned about this but all those other government agencies as well.

So, how do they determine if the ex-employee is a bona fide contractor or not? Although each agency has its own set of procedures, there are some primary questions that are asked, and they include:

- Does the worker own the equipment being used?
- Does the worker purchase the supplies?
- Does the worker have other clients?
- Does the worker have a contract for services as opposed to an independent contractor agreement?
- Does the worker have any employees?
- Does the worker bill you regularly on his/her own letterhead?
- Does the worker have a business license or incorporation papers?
- Do you or the worker control the work?
- Does the worker update you on the contract's progress as opposed to giving you a daily report?
- Does the worker control his/her own schedule?
- Does the worker carry out his/her task unsupervised?
- Does the worker do work that is merely supportive to your business as opposed to doing work that is a vital, central part of your company's operations? In other words, is the worker doing for you the same work you are doing for your customers?

There are about 20 such questions as part of these investigations. The more questions to which you answer *No*, the more likely it is that the worker is an employee.

If the DOL or any of the other agencies find you in violation of this rule, it usually requires you to pay all those back taxes plus interest and penalties, and back wages plus overtime plus penalties.

3. Overtime

There are many regulations on the various types and circumstances surrounding overtime. The basic issues are:

- The company must post the 168-hour period that makes up its official workweek. Normally, that's a statement that says something like this: *Our official workweek begins on Monday morning at 12 a.m. and continues on through to the following Sunday night at midnight. All hourly paid (nonexempt) employees who work more than 40 hours in our workweek will be paid overtime at the rate of one-and-one-half (1*

½) times their regular rate of pay for each hour they work over 40 hours.

- Overtime is calculated on a weekly basis and cannot be averaged over a two week pay period. In other words; you cannot avoid paying overtime by having an employee work 50 hours in one week and only 30 in the second week and considering it as a total of 80 (or average of 40) hours over the pay period. You can pay biweekly, but the overtime must be calculated on a weekly basis.
- All overtime worked in one pay period must be paid in full on the next payday. Overtime may not be accumulated to be paid out at the end of the month.
- Bonuses for good work are considered part of wages and must be added to the regular base rate when calculating overtime. Only general bonuses (not as rewards for any productivity or work-related results) are exempt from this rule and need not be added to the overtime calculation.
- Compensatory time is not allowed for private industry workers who are paid by the hour. Other than for government workers, all overtime must be paid time and cannot be traded for additional time off. However, exempt (salaried) workers may be allowed compensatory time.

If the DOL finds you in violation of this rule, it will usually require back pay and penalties**.**

4. Deductions from pay

Beyond the normal deductions, such as tax withholding and health insurance premiums, there are strict requirements for what can be deducted and how much. In cases where the employee owes the company money, it can be very difficult to collect it. Let's look at a few basics:

- You are never allowed to withhold an employee's paycheck. If the employee owes you money and refuses to pay, you cannot withhold his/her check.
- Before money can be deducted, you must secure the employee's agreement to do so. The agreement should be current, in writing, specify the cause of the deduction, the total amount owed, and the amount the employee agrees to be deducted from each paycheck. This must be done after the event occurs that caused the charge.
- An employee may be charged for uniforms via payroll deduction. But, if the employee leaves the company and does not return the uniforms, you must previously have obtained his/her signature on an agreement stipulating this in order to collect.
- The company is required to comply with deductions that result from garnishments from court orders or child support claims. Sometimes, missing tools, breakage, or personal loans are being charged to the employee. However, the amount deducted may not bring the paycheck down to less than minimum wage. That means, when you divide the total amount of money left on the check by the number of hours it took to earn it, the hourly amount may not be less than minimum wage.

  Most employers know this. The mistake often made is that the employer schedules overtime hours to fatten up the paycheck to allow for a larger deduction. But, the regulations do not allow you to include overtime in the calculation. Overtime earned is not subject to such deductions.

  There are certain deductions, such as food, shelter, transportation, facilities, provided as part of the employment agreement that can lower the check to less than minimum wage.

  Deductions from the paychecks of exempt (salaried) employees must be handled carefully. As a rule, everything deducted should be accomplished through a written agreement. The risk is that if there is any indication the employee's pay has been altered because of the quality or quantity of the work, it will be considered a violation**.**

If the DOL finds you in violation of this rule, you may have to repay the money and usually a penalty is levied.

5. **Employee Handbooks**

There is no requirement that a company have an employee handbook, but if you have one, there are certain things that must be included:

Americans with Disabilities Act (ADA)

If you have 15 or more employees, you must comply with the ADA and inform your employees.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

If you have 20 or more employees and you provide health benefits, you must inform employees of their right to continue their benefits at their own expense if any event is occurring that will cause those benefits to cease.

Equal Employment

You must inform applicants and employees of your nondiscrimination policy.

Family and Medical Leave Act (FMLA)

If you have 50 or more employees, you must comply with the FMLA by allowing eligible employees up to 12 unpaid weeks off for medical purposes.

Lactation Breaks

Although the new health care bill does not fully begin until 2014, some parts of it are already in effect and being enforced. The Lactation Breaks regulation went into effect August 2011. It requires all employers to provide all nonexempt (hourly paid) mothers with children up to one year old and who wish to dispense breast milk sufficient breaks to do so. The breaks are unpaid, unless you also provide paid breaks to other employees. The employer must provide a suitable facility with privacy and a method to store and protect the dispensed milk. The facility may not be a toilet.

Military Leave (USERRA)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) requires you to allow employees to perform their military duties without fear of job loss and to reemploy them after they have served in the military.

Sexual Harassment

You must include a definition of what sexual harassment is, state that you forbid it, and explain how to report it and how you will handle it.

Workweek and Overtime

You must inform your employees of the 168-hour period that makes up your workweek and how to calculate overtime.

There are certainly many more policies that should also be included but these are required.

For enforcement of the new health care law, which is a tax issue, the investigators may be from the IRS.

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Have An Employment Question?

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