

and applicable federal and state law is absolutely necessary to minimize the risks.

Misclassified as exempt

When an employer improperly classifies an employee (or entire class of employees) as exempt, and fails to pay overtime, the consequences can be dramatic. The details are tedious and too numerous to list here, but they are incredibly important: If the employer gets it wrong, the employer will owe significant back pay, attorneys' fees and interest.

If that warning isn't enough to get an employer's attention, these recent awards should be:

- In August 2009, Cintas Corp. agreed to pay \$22.75 million to delivery drivers nationwide, after allegedly misclassifying them as exempt and failing to pay overtime.
- In October 2009, IBM Corp. agreed to pay \$7.5 million to approximately 6,000 technical support employees who were allegedly misclassified as exempt under various state laws.
- In September 2009, Staples Inc. was ordered to pay more than \$7.3 million in back pay, liquidated damages and attorneys' fees for failing to pay overtime to 343 employees who were misclassified as exempt.
- In August 2009, Kaiser Permanente agreed to pay \$1.4 million to settle overtime claims brought by approximately 200 project managers who had been allegedly misclassified as exempt under the FLSA.
- In February 2009, Excel Insulation Co. and its corporate officer were de-barred from public construction projects for one year and agreed to pay \$661,000 in back pay and fines owed under Massachusetts law for failing to pay the prevailing wage, failure to pay overtime, and failure to maintain proper payroll records.

Misclassified as an independent contractor

Employers sometimes get into trouble for failing to pay overtime by misclassifying employees as independent contractors. This risk is particularly high in Massachusetts, where the Independent Contractor Law severely restricts the use of independent contractors, but the independent contractor

analysis is generally fact specific under federal and state law and can also vary from state to state.

Under federal law, an employee is dependent on the business which he or she serves, as distinguished from a person who is engaged in business of his or her own. Among the factors considered significant, but not determinative, in examining whether an individual is an independent contractor or an employee are: the nature and degree of control by the principle, the alleged contractor's opportunity for profit and loss, and the amount of the alleged contractor's investment in facilities and equipment.

Under Massachusetts law, an individual performing any service shall be considered an employee *unless*: 1) the individual is free from control and direction in connection with the performance of the service; 2) the service is performed outside of the usual course of business of the employer; and 3) the individual is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the service performed. As a result, the audit of an independent contractor requires detailed analysis under federal and state law.

Classification mistakes can be very costly, like a California residential cleaning service that, in August 2009, was ordered to pay \$3.5 million in back pay, liquidated damages and fines for improperly classifying 385 of its workers as independent contractors. Further, in October 2009, after failing to comply with the court's order to pay damages, the owners of the company were jailed for four days.

Under the FLSA, only certain paycheck deductions are allowed: If an employer makes improper deductions, the affected employees will be deemed "non-exempt" and entitled to overtime. In August 2008, a grocery store was found liable for \$25 million in back pay (for overtime) after it improperly docked the salaries of approximately 400 managers for hours not worked during the workweek, and therefore lost the exemption.

Failure to pay OT

Sometimes a company knows that its employees are non-exempt, but the compa-

ny fails to keep track of the hours worked or otherwise fails to pay overtime at the required one-and-one-half times the regular rate of pay for all hours worked over 40 hours in the work week (or as otherwise required by state law). The companies that fail to pay overtime must later pay back pay, *plus* liquidated damages, interest, attorneys' fees and fines.

In January 2009, several television networks (including Fox Broadcasting, American Broadcasting Company Inc. and CBS Broadcasting) and producers agreed to pay \$4 million total to settle claims that they failed to pay overtime and provide required break periods.

And two car-wash companies and their corporate officer agreed to pay approximately \$220,000 in back pay and interest, and approximately \$8,000 in fines, in a consent judgment entered with the DOL's Wage and Hour Division.

When an employee works for two different companies that are related, such as two subsidiaries of the same parent, the employees' hours may need to be combined and overtime may have to be paid for hours worked over 40 hours in a work week for the two companies combined.

In July 2009, Partners Healthcare agreed to pay \$2.7 million in back pay for overtime to 700 employees who were working for more than one Partners-affiliated hospital during the same week. Partners brought the issue to the attention of the DOL after recognizing that it may have violated the FLSA.

Under the FLSA, there are complicated regulations governing the calculation of an employee's regular rate of pay for purposes of determining overtime pay. For example, attendance bonuses and other non-discretionary payments must be included in employees' regular rate of pay and therefore should be included in overtime pay calculations.

It doesn't pay to procrastinate on a wage-and-hour audit, and failing to act quickly and effectively could instead result in a big pay day for plaintiffs' attorneys. In the next issue, we will take a look at state law wage-and-hour "traps."

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