

OPINION

The wage and hour audit: state law traps

By William E. Hannum III



While overtime is perhaps the most significant wage and hour problem area, it is by no means the only one.

In fact, there are numerous other trouble spots, most of which arise under state law — and

which (maddeningly for employers) can vary dramatically from one state to the next.

And as the cases show, failure to comply with these miscellaneous wage and hour laws (from meal breaks to tip pooling) can be costly to both the employer and its senior officers.

The list of state law traps below, while by no means exhaustive, includes those that have caught some large damages awards in recent months.

Meal breaks

Despite differing requirements, state laws generally require that employees receive meal breaks and rest breaks. For example, Massachusetts law provides that, generally, all employees be given a 30-minute break after having worked six hours in one day, while Connecticut law provides that employees must work seven-and-a-half consecutive hours before being entitled to a 30-minute break.

Three lawsuits that targeted Wal-Mart demonstrate the high price that can be paid if one runs afoul of those rules.

In June 2009, Wal-Mart agreed to pay up to \$54.25 million for allegedly failing to provide breaks, maintain proper work records, pay for employee breaks and pay for training for thousands of workers in Minnesota.

The following month, Wal-Mart agreed to pay \$35 million for allegedly failing to pay approximately 88,000 employees for off-the-clock work and for work performed during meal and rest breaks.

And in September 2009, Wal-Mart agreed to pay Massachusetts \$3 million to resolve allegations that it failed to properly comply with the state's meal break law. Workers reported they were required to work through their meal breaks, take meal breaks after they had worked over six hours, or spent less than 30 minutes on their meal breaks.

Off-the-clock and donning and doffing

Likewise, employers are frequently getting into trouble for failing to pay non-exempt employees for work done "off the clock." That can include requiring (or allowing) non-exempt employees to check e-mail at home and requiring them to "don" certain required gear before their shift (and "doff" the gear afterwards).

Donning and doffing gear is a "principal activity," and thus time spent in those activities, as well as walking and waiting time that occurs after the employee engages in his first principal activity, is part of a "continuous workday" and is compensable under the federal Fair Labor Standards Act.

In January 2009, Nestle paid \$5.1 million in back wages to more than 6,000 employees for failing to pay for time spent donning and doffing required equipment and clothing. The company subsequently identified additional back wages owed to employees in Kentucky, Ohio and South Carolina.

Tip pooling

The laws regulating the pay of tipped employees, particularly concerning tip pooling, vary significantly among states. In Massachusetts and California, an employer can require service employees to pool their tips with other service employees, whereas in

New York tip pools must be voluntarily entered into by service employees. When employers violate these tip pooling laws, the cost can be significant.

In February 2009, hundreds of wait staff at three New York City restaurants requested the court's approval of a \$2.5 million settlement of claims that they were unlawfully required to share tips with management and sushi chefs (in violation of FLSA and state law). One third of the settlement (\$833,333) was designated for attorneys' fees.

In August 2009, the Supreme Judicial Court ruled in favor of nine skycaps claiming that American Airlines owed them \$325,000 for violating Massachusetts' tip pooling law.

In March 2009, after a two-and-a-half week trial, a Texas jury found that a restaurant violated the FLSA by requiring approximately 55 food expeditors to share in the tip pool. Similar lawsuits have been filed since then, against the same defendant, in other locations.

Record-keeping violations

The FLSA and most state wage and hour laws also impose record-keeping obligations on employers. Those requirements should be taken seriously and should be reviewed in the wage and hour audit. Technical violations of the requirements are resulting in significant fines and penalties.

Indeed, on Sept. 15, 2009, the U.S. Department of Labor sued a Brooklyn, N.Y., food distribution company for alleged violations of FLSA's record-keeping requirements.

In August 2009, American East Painting and its president were cited and fined \$90,000 by the Attorney General's Office for record-keeping violations and failure to pay wages as required by Massachusetts law.

In May 2009, the AG's Office cited Touchpoint Global and its former director for failing to pay employees in a timely manner and for failing to furnish payroll records to the AG. The citation includes approximately

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\$49,000 in back pay to seven employees and \$10,500 in fines.

Failure to pay in timely manner

State and federal wage and hour laws require that employees be paid within a specified period of time after the pay period. In Massachusetts, an employer generally must pay its employees within six days of the end of the relevant pay period, whereas in Connecticut and New Hampshire, for example, compensation is due within eight days of the end of the pay period.

In May 2009, the Attorney General's Office cited MicroLogic and its president for failing to pay employees in a timely manner. The citation included approximately \$378,000 in back pay to seven employees and \$31,000 in fines.

Frequency of payments

Generally, state laws impose specific requirements regarding how frequently employees must be paid. In Massachusetts, hourly employees must be paid weekly or bi-weekly, while salaried employees can be paid weekly, bi-weekly, semi-monthly or — at an employee's own option — monthly.

In September 2009, Delta Airlines was fined \$35,000 for paying its hourly, non-exempt employees on a semi-monthly, rather than bi-weekly basis. There was no allegation that its employees had not been paid, only that payment was delayed.

Vacation pay

Generally, state wage and hour laws impose some sort of requirement to pay accrued but unused vacation benefits to employees upon termination of employment.

For example, in June 2009, the SJC ruled that EDS violated Massachusetts law when it failed to pay accrued but unused vacation upon termination of employment.

EDS's vacation policy had attempted to avoid the requirement to pay vacation to involuntarily terminated employees by stating that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

The SJC did not address whether EDS could deny paying accrued vacation to an employee who left EDS voluntarily.

In October 2009, Kelly Services agreed to pay \$11 million to settle claims that it failed to pay vacation (the company allegedly had an unlawful "use it or lose it" policy under Illinois law), and gave employees improper (vague) pay stubs. Of the \$11 million payment, \$3.3 million was reserved for attorneys' fees.

In March 2009, Jefferson at Bellingham and its president were cited for approximately \$60,000 in back pay and fines for failing to pay vacation pay to 26 employees who left the company, in violation of Massachusetts law.

Final pay

Most states have laws that specifically address the issue of when employers must provide employees with their final pay check. In Massachusetts, involuntarily terminated employees must be paid immediately upon termination. In New Hampshire, and in contrast to federal law, salaried employees involuntarily terminated without cause during a pay period generally must be paid for the entire pay period, regardless of the number of days the employee actually worked in the pay period.

In January 2009, Iris Media Group, its CEO and the "company manager" reached agreement with the AG's Office to pay more than \$62,000 in back pay to 39 employees who were terminated without receiving their final paycheck.

Child labor laws

State laws establish many restrictions on employers' ability to employ minors. In Massachusetts, these restrictions vary by the age of the employee; for example, employees aged 14 to 15 can generally work only 18 hours per week during the academic year. In addition, work permits are required, and there are certain job duties that minors cannot perform.

In June 2009, Boston Sports Club paid a \$40,000 fine to the AG's Office for allowing minors to work before and after permissible hours, allowing minors to work in excess of the maximum daily and weekly hours permissible, and employing minors without the required work permits.

Sunday and holiday pay

Many states have laws requiring employers to pay premium rates to employees who work on Sundays and certain holidays. For example, in Massachusetts, employees engaged in the retail industry must generally compensate their employees at a rate of one-and-a-half times the employees' regular rate for worked performed on a Sunday.

In June 2009, GOL Foods and its president reached an agreement with the AG's Office to pay \$90,000 in back pay and fines for failing to pay 30 employees OT, Sunday pay and holiday pay.

Next steps: the to-do list

Hopefully, the need and value of conducting a wage and hour audit is self-evident. The odds are increasing that every company will be the

target of some kind of wage and hour claim. And it seems clear that the back pay, fines, penalties and attorneys' fees incurred in resolving those claims will be far greater than the cost of a properly conducted audit.

For companies that are serious about auditing their wage and hour practices, here are the steps to take:

- Give audit responsibility to the appropriate person for the company — the vice president of human resources, the general counsel or perhaps outside counsel.
- Be sure experienced counsel is involved: They can help navigate the nuances of applicable wage and hour laws and protect the audit under the attorney-client privilege.
- Assemble and (if necessary) train the audit team, which may include paralegals, junior attorneys and/or human resources professionals.
- Have the audit team work methodically through the relevant wage and hour issues.

Counsel will need to provide guidance on the relevant legal issues, under federal and applicable state laws, depending on the nature of the work force and compensation practices.

The human resources and payroll departments will need to provide the audit team with documents and information ranging from job descriptions to payroll records, while managers throughout the company may need to be available to clarify relevant facts, such as job duties actually performed or practices actually followed (as opposed to duties in the job description that are not performed, or written policies that are not followed).

And the audit team will need to collect and review policies, handbooks and job descriptions.

After the fact-gathering is complete, the audit team should report to the general counsel's office regarding its preliminary findings and map out plans for follow-up investigations and ways to address any problem areas.

Generally speaking, a thorough audit will turn up non-compliant practices that generally should be remedied as soon as possible. But there are often several options available for doing so. So before any remedy is implemented, the company should consult with experienced counsel to determine the most appropriate remedy under the circumstances.

When correcting problem areas, be sure to revise policies, the employee handbook and job descriptions as necessary.

And be sure to protect the audit under the attorney-client privilege to the greatest extent possible. 