



# WAGE LAW WOES

## WATCH OUT FOR COMPLEX COMPENSATION RULES THAT COULD BREAK THE BUSINESS

BY JACK GARSON

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***April 2013 – As seen in the SmartCEO Magazine.***

Everybody's breaking wage laws. Well, not everybody. But the laws governing the wages you must pay to different employees in different situations are complicated and often so counterintuitive that many businesses regularly violate these requirements. Heck, even the average lawyer does not know the nuances of these laws.

A variety of requirements apply, from state to national laws. Then, unique regulations govern certain types of businesses and specific categories of employees. As a result, large and small companies from virtually every industry have faced big dollar lawsuits and often paid costly settlements to end them. For instance, Morgan Stanley recently paid \$42.5 million to settle a class-action lawsuit alleging that the company failed to pay overtime wages to commission-based brokers and broker-trainees. Similarly, Merrill Lynch paid \$43.5 million, and Wachovia paid \$39 million to stock brokers. And as big business, you'd think they'd know the law.

### **The Basics**

The rules regarding employee compensation would fill a bookshelf – maybe even a small library – but certain basics apply. As a general matter, under federal law – which applies in every state – your business must pay each employee a minimum wage and then overtime compensation to employees that work more than 40 hours per week. The current federal minimum wage, in effect since July 2009, is \$7.25 per hour. It sounds simple, and for the most part, it is.

But overtime compensation gets complicated. In Maryland, Virginia and Washington, DC, you must pay one and one-half of your employee's "regular rate of pay." But the regular rate of pay formula is not a common-sense calculation. You might think that the regular rate of pay is the hourly wage you pay your employee. If only it were that simple. Instead, the regular rate of pay – on which the overtime calculation is based – includes other compensation, such as housing allowances and commissions. So if you are paying your employees an hourly wage and a commission, and then they work overtime, you need to calculate that overtime using a complicated formula that takes into account the commissions. Worse, if you are just paying them commissions and you don't pay that required hourly wage – which happens all the time – you need a lawyer.

Then there are exceptions to the minimum wage and overtime requirements. Again, the basics are simple. For example, neither the minimum hourly wage nor overtime applies to professional,

administrative or executive employees who are paid a certain salary. Most of the big-dollar lawsuits and settlements occur because companies assume certain employees fit within a particular exemption when, in fact, they don't. One of the most common misconceptions is that any employee who is paid a salary, regardless of his or her job duties, is automatically exempt from overtime pay, which is not the case. You must pass both parts of the test – required job duties and minimum salary.

### **State Law Twists**

On top of the federal wage requirements, each state can, and often does, apply tougher or different local requirements. For example, some states require businesses to pay their employees for unused vacation time. In some places, when you terminate employees, you must deliver the workers' final paycheck to the employee when you fire them or very soon thereafter. Furthermore, it does not matter where your company is headquartered; you must comply with the state laws where your employees work.

### **Where it gets crazy**

Like I said, this stuff is not common sense. Employees at one large manufacturing company sued their employer for compensation for the five minutes each employee spent putting on his or her uniform before their shifts began. The business ended up paying an enormous amount of money because this time getting ready for work was considered work time. In fact, because these few minutes every day exceeded the regular 40-hour work week, the overtime compensation rule applied. When this time – and the related compensation – was multiplied by thousands of employees over a few years, the company was required to pay out a substantial amount of money.

There are numerous other pitfalls related to wage claims and requirements:

- **Extra time:** If an employee volunteers to work extra time, even to fix his own mistakes, this is work time that counts toward the regular 40-hour work week and overtime.
- **Temps:** When you obtain temporary employees from a placement firm, you can still be considered a “coemployer” of the temp and liable for his compensation. You may want to obtain the temp agency's agreement to indemnify you for any claims by the temps.
- **Subcontractors:** In some cases, the employees of subcontractors are suing prime contractors for unpaid wages. Absent extraordinary circumstances, you should not be liable for these claims, but they are increasing, expensive and time-consuming to defend.
- **On call:** If you have employees who are “on call” at or nearby your place of work, you may be required to pay them for their time under certain circumstances.
- **Breaks:** Short breaks, those running five to 20 minutes, are generally considered working time and must be compensated.

Furthermore, the burden is on your business to keep records of when your employees work. If a group of your employees claim that they are entitled to overtime compensation, you must show when your

employees were working. Otherwise, the court will generally honor any claim that appears to be made in good faith by your employees.

### **The Hangover Effect**

Employees' leverage in a wage lawsuit can be potent. When ex-employees sue you for unpaid overtime compensation, they generally can obtain unpaid compensation that was due during the two-year period prior to the lawsuit – and that time period will be increased to three years if you knew but ignored the overtime requirements. In addition, employees who successfully sue for these wages usually can require you to pay their attorneys' fees and court costs. At the state level, certain laws enable employees to obtain two to three times wrongfully withheld wages, plus attorneys' fees. So when you fail to calculate and pay your employees the proper wages, a dark cloud of potential liability hangs over your business for years. Knowing the wage laws, structuring compensation correctly, keeping the proper records – it's all difficult. But it is far harder to fend off a wage lawsuit or write a big settlement check.

Jack Garson is the founder and a principal of the law firm Garson Law LLC in Bethesda, MD, and he is also the author of *How to Build a Business and Sell It for Millions*.

Jack Garson  
Garson Law LLC  
(301) 280-2700  
jgarson@garsonlaw.com