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The Top 7 most common wage and hour mistakes

by Carolyn D. Richmond & Seth M. Kaplan * • 31 Mar 2010

For much of the last decade the restaurant industry has faced heightened scrutiny of its wage and hour practices. In particular, the industry came under fire from department of labor (DOL) investigations and private class action law suits. Unfortunately, operators have discovered that many long held industry practices and customs were not always compliant with existing wage and hour laws.

Whether intentional or not, when violations are found, restaurant operators face draconian penalties which include not only unpaid back wages, but liquidated damages (up to 100% of the monies owed), civil penalties, interest, and the employees' attorneys' fees incurred.

With no signs of these class action suits abating, and an increasingly activist Obama Labor Department, it is imperative that restaurants review their compliance with all applicable wage and hour laws.

Below is a list of the top wage-and-hour mistakes commonly made by restaurant owners throughout the industry:

Failure to Maintain Proper Records. Under the federal Fair Labor Standards Act (FLSA), employers are required to maintain complete payroll records (including but not limited to information regarding the employees' hours worked and compensation paid each week) for a minimum of three years. Many states require employers to keep their records for even longer periods of time.

While a restaurant's failure to maintain such records is a violation of the FLSA in and of itself, this type of failure becomes even more costly in disputes regarding unpaid wages because, under such circumstances, the courts will typically credit the employees' testimony regarding the number of hours worked or compensation paid.

Failure to Accurately Record Employees' Hours Worked. It is the employer's

responsibility to ensure that the attendance and work hour records are accurately kept and maintained.
Employees should be credited for all hours during which they are performing work for the restaurant. Employers cannot, for example, modify the time records to cut time if an employee clocks in prior to a scheduled start time but is in fact still performing work. If an employee is performing work outside of scheduled hours, these issues should be addressed through discipline, not by altering the employee's time records.

Failure to Properly Inform Service Staff of Tip Credit. The FLSA provides that, as an express condition of taking the "tip credit" provided for in the statute (and paying tipped employees a base wage rate below the standard minimum wage rate), the tipped employees must be informed by the employer that the tip credit is being taken. Too often, restaurants take the tip credit without ever informing their service staff that they are doing so.

The notice of taking tip credit can be accomplished in many ways, but the most efficient method is to ask the employees to sign a written acknowledgement that they understand the tip credit is being applied to their wage rate. This can be accomplished at the time of hire or in an employee handbook. Of course, in states where the tip credit is not permissible (e.g. California), this notice is not applicable.

Improper Inclusion of Non-Service Personnel in Tip Pool. Another condition for using the "tip credit" is that employers may only permit those non-managerial employees who "customarily and regularly" receive tips to participate in any tip pool. This is determined by the employee's actual role within the restaurant at issue, not on their title or the industry standard. This is typically a case by case analysis. Hosts or sushi chefs in one establishment may qualify to participate in one pool but may not in another.

Failure to Properly Classify Salaried Employees. Many employers operate under the mistaken assumption that an employee can be classified as "exempt" (and therefore not entitled to overtime) simply by paying such employee on a salaried basis. To be exempt under the FLSA, employees must receive not only a guaranteed minimum weekly salary of at least $455 per week (which is higher in many states), but they also must satisfy the "duties test" under one of the specifically listed exemptions under the statute (e.g., administrative, professional, and executive).

In other words, the test for determining whether an employee is exempt from the overtime requirements is determined by the functions they perform as well as the amount and method by which they are paid. This issue in particular is facing increasing scrutiny by the DOL and plaintiffs' bar as it relates to line cooks misclassified as "salaried" exempt employees.

Failure to Calculate a Blended Rate for Overtime Purposes. Restaurant owners also make the common mistake of failing to properly calculate the overtime pay owed to those who do receive overtime, most notably those who work in two different positions at two different rates during the same workweek (e.g., as a server and a host). When this occurs, and the employee works more than 40 hours during that particular week, the employee's overtime rate is determined by calculating time and a half of the employee's "blended rate" of the two positions (determine by dividing all compensation received by all hours worked), not simply time and a half of the lower rate of pay or the rate of pay for the position in which the overtime hours were worked.

Improper Deductions. Although the rules vary from state to state, many states have laws prohibiting employers for deducting any monies from an employee's paycheck which do not directly benefit the employee and/or which are not pre-authorized by the employee. Therefore, restaurants are often unknowingly violating their respective state law when they impose paycheck deductions for things such as breakage, "bank" shorts, and credit card fees.

Although only a sampling of common errors, operators can avoid many of the lawsuits and DOL investigations simply by avoiding the mistakes listed above. However, it is recommended that operators seek legal counsel and consider conducting an internal audit of all wage and hour practices.

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