

The Case for Wage & Hour Training

Employees today are 10 times more likely to file a wage-law class-action lawsuit than one based on discrimination or harassment. Effective wage-and-hour training is an organization's best weapon in preventing and defending these suits. It keeps your company in compliance, out of court and in the black.

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It is 7:55 a.m. on Friday and you have an urgent message from the general counsel to meet him in the CEO's office. The text message reads: "We have just been served with a wage and hour class action."

Upon entering the CEO's office, she turns to you as the head of HR and asks: "How could this happen here, and what have we been doing to make sure we are complying with wage and hour requirements?"

The Wage-and-Hour Class-Action Epidemic

How could a class action target your organization? Easily.

Every employee who sees a plaintiff's attorney over a disagreement in the workplace will routinely be questioned about pay practices. The Fair Labor Standards Act is an industrial-era law that adapts imperfectly to the digital workplace.

The plaintiff bar knows the challenge of wage-and-hour compliance, and the resulting epidemic of class actions is the No. 1 HR risk currently facing all organizations.

Instead of handling a single wrongful discharge or discrimination case, an alleged pay violation can be brought as a class action, seeking millions and attorney's fees usually equal to at least 25 percent of the entire recovery.

Common federal and state claims include exemption misclassifications, independent-contractor classifications, uninterrupted meal-and-rest-break requirements, unpaid overtime, off-the-clock or unreported work, payment for travel time, pre- and post-work activities, tip ownership and distribution, commissions as part of overtime, and calculating the regular hourly rate of pay.

Additionally, plaintiff counsel is increasingly claiming that wage violations support claims under the Racketeer Influenced and Corrupt Organizations Act, charges under the Employee Retirement Income Security Act and breach-of-contract claims.

There were 1,844 employers sued in wage-and-hour class-actions filed in just the first quarter of 2010, according to statistics collected by Littler Mendelson. If this pace continues, 2010 will record 25 percent more wage-and-hour class-actions than 2009 -- which saw 40 percent more suits than 2008.

These class-actions now account for an astonishing 84 percent of all employment class-actions filed. Originally, these lawsuits seemed to be based in California and Florida, not in the Midwest or

elsewhere. But, especially in the last two years, these actions have been nationwide. In 2009, every state had at least one wage-and-hour class-action filed. Illinois and Texas are now among the top states for such suits.

Once a minor line in an organization's legal budget, now wage-and-hour suits make headlines. The U.S. Department of Labor reports that in fiscal year 2008, more than 197,000 employees received a total of \$140.2 million in minimum-wage and overtime back wages as a result of [DOL investigations](#) . In civil suits, the average of 124 reported settlements in 2009 was \$8.2 million, including damages and plaintiffs' attorney fees and costs, according to "The Future of Wage-and-Hour Class Actions, by Garry Mathiason and Mark Thierman, in National Law Journal.

Recently, the Obama administration authorized 250 additional DOL field investigators, increasing its staff by one-third, with plans to add more in 2010-11. Secretary of Labor Hilda L. Solis discussed these and other fiscal year 2010 DOL initiatives in a [May 2009 open forum](#).

The agency has announced a record number of planned audits targeting misclassification of independent contractors. The DOL's fiscal year 2011 [budget proposal](#) anticipates hiring 90 more investigators to target independent-contractor misclassification, and conducting 4,700 more audits focusing on industries such as construction, child care, home health care, grocery stores, janitorial, business services, meat processing and landscaping.

Training Is a Key Part of Compliance

The question of what is being done to ensure wage-and-hour compliance is a question every HR professional and corporate employment counsel should be expecting.

Most HR departments do a good job of developing compliant policies and keeping them up-to-date, but, often, implementation practices with front-line supervisors and employees could be improved. One of the most important of these practices is effective training -- and teaching the importance of reporting wage-and-hour concerns to senior management and/or HR.

Common problems include hourly employees who allege that inadequate overtime is authorized, resulting in supervisors promoting and permitting unreported hours (off-the-clock work) and employees working interrupted meal periods.

Similarly, some exempt employees allege that inadequate staffing forces them to primarily perform work not qualifying for an overtime exemption.

While we focus here on training, it is only part of an overall compliance initiative including a possible internal audit, review of policies, corrective action, and monitoring. A comprehensive, seven-step plan for organizational compliance is [here](#) .

One of the best responses to the CEO's question about wage-and-hour compliance would be to report the prior adoption of a comprehensive program that includes wage-and-hour training. This shows an effort to implement and teach good policies -- and has the practical benefit of either avoiding class-actions or providing evidence to help defend against them.

Training that Targets the Audience

In building a training program, it is essential to start with an understanding of the audience. If the training is designed for HR professionals and certain senior managers, it will necessarily be complex and cover the development of legally compliant policies.

This instruction is best provided in live presentations by subject-matter experts. Policy language and legal review will be important because this group has the responsibility of developing compliance policy.

For example, the definition of an independent contractor might be explored, along with the process the employer will be using for making or deciding to outsource classification decisions. Another example would be the calculation of the regular rate of pay for overtime purposes, which may require factoring a bonus payment into the employee's hourly rate.

A second training audience consists of managers and front-line supervisors. They need to understand the policies they would be responsible for enforcing and the importance of consistency.

Some of the expected training topics are scheduling; reporting time and procedures; authorization and approval of overtime; time-recording procedures and documentation; correction of time records including automatic meal period deductions (if used); scheduling breaks; providing an uninterrupted meal break; and ensuring that all time is reported. Information should also include state law, local ordinances, industry differences and exceptions.

In addition to implementing policies, exempt managers and supervisors need to understand that their employer expects their primary duties will be managerial and supervisory. This does not prohibit occasional production work when necessary or for teaching purposes, but these tasks must remain secondary.

In states that have objective tests of exempt and nonexempt duties, managers and supervisors need to know they cannot spend more time doing hourly work than is legally permitted. Indeed, that is not why the employer has given them managerial or supervisory positions.

While live training could be effective, managerial learning can also be done online. Such training can be cost-effective, demonstrably uniform and available when new people are hired or promoted. In addition, online training, including training videos, can be automatically documented and the course can be reproduced and shown to a judge or jury.

Such training should be interactive so learners must demonstrate an understanding of the course and have the ability to ask questions. Many of the answers can be automated and key parts of the company's policies can be highlighted. Employee questions can be electronically transmitted to an HR professional for response.

Usually a certificate of completion is required with an electronic signature. Part of that certification can be an affirmative pledge to comply with the company's policies and report concerns or possible violations to HR or senior management. For example, reports from managers could identify concerns with meal period compliance, and isolate wage and hour issues before the entire organization is impacted.

Employee Wage-and-Hour Training

Online training is also effective for the third group to be trained: hourly employees. The content of hourly-employee training focuses on recognizing problematic behavior and reporting it.

Key concepts are:

- Identifying "working" time, with relevant examples;
- Proper timekeeping practices and procedures for review of time records;
- Compliance with overtime-authorization policies;
- Using the company's wage-payment complaint process;

- Commitment not to retaliate against employees bringing good-faith wage complaints;
- Disciplinary consequences for failure to follow timekeeping policies.

The training should include state wage-and-hour laws since they often include more restrictive conditions than the FLSA.

In addition to delivering relevant information, such a program is a record of the employee's participation in and understanding of the company's wage practices. A final course certification is usually required, including a promise to report situations of potential noncompliance with company policies.

Defeating Class-Action Certification and Constructing Defenses

Should a wage-and-hour class-action lawsuit nonetheless arrive, evidence of training will be invaluable in providing a defense. The threat of the class action is that once a class is certified, representative testimony can be used to establish liability. Defeating class certification often is the difference between a few individual claims and multimillion-dollar companywide exposure.

Quality training is proof of the organization's commitment to make its policies and practices understandable and uniformly enforced. Employees learn that they have multiple channels to report suspected violations free of retaliation. If the underlying policies are legally correct, supervisory and employee training weighs heavily against certification.

Training and compliance programs also are evidence of good faith under the FLSA, potentially preventing the assessment of liquidated damages in an amount equal to back wages. Under state law, training can reduce punitive damages and support the avoidable consequences defense for mitigation.

A federal court recently granted summary judgment to Black & Decker against a plaintiff and his class-action allegations. In *Kuebel vs. Black & Decker (U.S.) Inc.*, an hourly employee claimed he was discouraged from reporting all of his hours and overtime, according to court documents. The court found the employee's testimony unreliable, in contrast to the employer's documented wage-law compliance.

The company produced evidence of its written policies and training materials, code of ethics, anti-retaliation policy for complaints and anonymous hotline for reporting violations. The court noted that the company trained non-exempt employees and their managers, and regularly re-trained them. These basic compliance tools transformed a potential class-action into a summary dismissal.

Training Is Likely to Become Mandatory

In April, the Department of Labor described its plans for an enhanced enforcement strategy entitled: "Plan/Prevent/Protect." The goal of the program is to require employers to "find and fix" violations before the DOL begins an investigation. In the DOL's view, current regulations allow employers to operate under a "catch me if you can" compliance approach. The DOL is determined to change this, with enhanced enforcement, additional investigators and public-awareness campaigns.

Inherent in the "find and fix" approach is the need to show that, at least, managers are fully informed about the policies and alerted to report possible violations.

This DOL initiative invites an employee-complaint system, which, in turn, requires some knowledge of the company's policies and expectations. Training encourages internal reporting of employee concerns and shows multiple ways to report problems, including making a report directly to HR.

Additionally, training explains the commitment of the company to its non-retaliation policy. The DOL is aware of such training efforts and their effectiveness. Accordingly, the DOL is likely to issue to employers a strong training recommendation or mandate.

Beyond a mandate from the DOL, another powerful reason for required wage-and-hour training is the frequency with which plaintiff counsel uses the absence of training as evidence of a culture of noncompliance. As training becomes increasingly a community standard, it will be argued that the lack of training is itself actionable, especially in states with more aggressive wage-and-hour laws, such as California. In this type of environment, training becomes a litigation necessity.

One of the most powerful elements of any training program will be the ability to show that supervisors and employees have received your wage-and-hour policies, understood their meaning, and made a pledge to comply. This is the promise of wage and hour training as part of a full compliance program.

Your organization can likely fund effective preventative training for the next decade for less than 10 percent of the cost of defending a single wage-and-hour class-action. While legislative and regulatory reform may eventually bring wage and hour laws into the 21st century, the only immediate cure for the current class-action epidemic is to make a full compliance commitment with wage-and-hour training as the centerpiece. It may be the best career and business investment of the decade.

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