

# WAGE AND HOUR LEGAL UPDATE: THE HIDDEN DANGERS OF WAGE AND HOUR CLAIMS FOR STAFFING COMPANIES

By *Richard L. Steer*



One of the hottest developing areas in Employment Law is also one of the most dangerous for employers and those involved in setting employees' terms and conditions of employment. While Professional Employer Organizations (PEO'S) that administer the payroll practices of employers are particularly vulnerable, traditional staffing companies are also at risk of being accused of being a joint employer responsible for failure to properly pay overtime and minimum wages to employees.

One reason why wage and hour claims are increasingly dangerous to employers, or owners of a business, is that the ordinary assumption that being incorporated insulates the owners or managers of the business from individual liability is simply not true in the wage and hour area. It is becoming more and more common to see former employees suing not only the corporation they worked for, but also its owners and even the employees' immediate supervisors who directed their work or distributed their pay when companies allegedly failed to pay overtime and minimum wages.

In many cases, such individual liability is alleged to exist where the employer acted with the best of intentions and failed to pay the overtime pay or the proper minimum wage because of misunderstandings of the law's technical requirements. Such an honest mistake may not be a defense to liability, although it ordinarily should be a defense to the granting of liquidated damages equaling a doubling of the pay awarded under federal law for a willful violation or penalties under state law.

Another area that is receiving a lot of attention lately, and that will be increasingly important in the future, is whether employees are being properly classified as independent contractors or employees. The fact that an employee signs an independent contractor agreement does not guarantee that an employee will be determined by a court or government agency to actually be an independent contractor. While there are technical legal tests applied under state law, the Internal Revenue Code, and the federal wage and hour laws to determine whether an employee is an independent contractor rather than a statutory employee, it may be difficult to determine with certainty whether a correct classification of an employee's status is being made. New York Attorney General Andrew Cuomo has recently reported that his office will be stepping up its enforcement efforts and investigating claims that employees have been misclassified as independent contractors rather than employees.

Another significant area of misclassification that has been receiving a lot of attention, and is an area of great danger, is the issue of whether employees have been misclassified as bona fide professional, executive and administrative employees. Many owners of businesses simply do not realize that by failing to technically comply with all of the elements of the Labor Department regulations governing these exemptions, even highly paid employees may be eligible for overtime. Under the test for these so called white collar exemptions, employees must be paid a minimum of \$455 per week on a "salary" basis. The salary basis contemplates that an employee will receive the same check each week regardless of how many hours they work. There are times when an employer will dock an employee's pay only to find

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out later that they have inadvertently destroyed the “salary basis” and with it the exemption from paying overtime for all hours worked over 40 hours in a work week. For highly compensated employees this can become a particularly costly mistake.

Other areas where complexities exist in applying the white collar exemption is whether the duties of the employee sought to be classified as exempt truly are of a type that the law contemplates for exempt employees. Mistakes often lead to collective actions where an entire class of employees, such as investment advisors, alleges that they were misclassified and therefore can bring what amounts to a class action seeking all overtime pay that has been denied them.

While under federal law, the time in which to bring a lawsuit may be as much as three years, many owners of businesses are unaware that there is a six year statute of limitations in which to commence a wage and hour lawsuit under New York State law. Therefore, employers must retain their payroll records, including records of hours that an employee works, for in excess of six years.

The best defense in this developing world of wage and hour claims is for employers to seek legal advice in connection with their classification and payment of employees, and even to “audit” whether their pay practices and record keeping practices comply with the current state of the law. By doing so, staffing companies and their clients can minimize the very real dangers they face in the ever-changing employment arena.

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