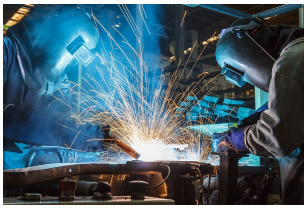

Top 5 Wage & Hour Issues for U.S. Manufacturers

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Wage and hour claims continue to be one the most expensive employment law risks for most employers. Non-compliance can trigger audits, investigations, and litigation, which can be disruptive, time-consuming, and costly for manufacturers. From 2010 to 2019, the U.S. Department of Labor (DOL) Wage and Hour Division's (WHD) assessment of back wages for minimum wage and overtime claims alone almost doubled—from $129 million in fiscal year 2010 to $226 million in fiscal year 2019. The WHD's total recovery in 2019 was at a record high, at more than $320 million. In 2022, the 10 highest reported settlements for wage and hour class and collective actions totaled a striking $574 million.

Continue reading the article below or watch this short video for key points and takeaways.

These pay issues are particularly impactful for manufacturers, who tend to be more process and systems-oriented and have large numbers of hourly workers. Prioritizing compliance and properly managing wage and hour issues not only helps employers mitigate risk but can also lead to increased operational efficiency and employee retention, thereby supporting a manufacturer's long-term success. Manufacturers that accurately track and manage

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employee hours, pay, and overtime are better positioned to allocate resources effectively and avoid unnecessary labor costs.

Many recent legal developments and trends have prompted automotive companies, as well as most other manufacturers, across the U.S. to take a closer look at current pay policies and practices. These wage and hour issues include considerations such as:

- When does the time putting on or taking off protective equipment constitute paid time
- Dos and don'ts of rounding work time
- How to structure uncompensated meal breaks
- Counting for overtime in bonuses and other incentive payments
- When independent contractors are appropriately classified

Because these day-to-day pay practices affect employees throughout an organization, even small errors in pay practices can multiply to substantial liability risks and are often the subject of class and collective action litigation. It is imperative that manufacturers ensure they are on the right side of compliance.

Consider the following top five wage and hour issues manufacturers are facing this year and some best practices that can help mitigate risk.

Donning & Doffing Claims

The Fair Labor Standards Act (FLSA) requires employers to compensate non-exempt employees for all time worked, as well as paying the minimum wage and overtime compensation. Compensability of time has become a frequently litigated issue, particularly with respect to pre-shift and post-shift activities such as donning and doffing or security checks. The phrase "donning and doffing" is used to refer to putting on (donning) and taking off (doffing) protective gear, work clothes, or equipment. Whether time spent donning and doffing is compensable depends on the facts at hand.

The challenge is often this, if an employer does not treat donning and doffing time as compensable when it otherwise should have,

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the entire group of affected employees may be entitled to pay for that donning and doffing time—and overtime pay for that time if it extended that employee's work time beyond 40 hours in the workweek.

When is donning and doffing time compensable? Generally, time spent donning and doffing specialized equipment is compensable and can be considered a "principal activity" of the employee's work under the FLSA and the Portal-to-Portal Act of 1947 ("Act"). However, simply changing clothes and washing under normal conditions are generally preliminary and postliminary activities—not "principal activities"—and are not compensable under the Act.

Donning and doffing can be considered a compensable "principal activity" if it is integral and indispensable to an employee's principal activities. What constitutes a "principal activity," however, is not always clear, as the regulations contemplate that the same activity may be "principal" under certain conditions and not under other conditions. Consider an employee whose role at a chemical plant requires protective gear that the employee must put on at the work site versus a convenience store employee who can easily put on and take off a uniform at home. The chemical plant employee likely should be compensated for the time they spent donning and doffing while the convenience store employee would not be.

Courts differ on whether time spent donning and doffing is compensable because these issues implicate mixed questions of law and fact. The factors that courts consider include but are not limited to:

- The location of the donning and doffing
- Whether the activity was required by or for the benefit of the employer
- Whether it was required by the nature of the job or applicable law, such as safety regulations
- Whether the gear in question is generic or non-unique rather than specialized

It is also important to note that collective bargaining agreements can affect whether time spent changing clothes and washing is

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compensable for the purposes of determining hours worked for minimum wage and overtime calculations under the FLSA.

Rounding Time

Although time clocks are not required under the FLSA, it is important for manufacturers to have some type of timekeeping system in place to track a non-exempt employee's time once they begin their first principal activity of the day. Employers must pay employees for all time worked, which can include pre- and post-shift activities. Generally, non-exempt employees who voluntarily come into work before their scheduled shift starts or remain after their shift ends do not have to be paid for that time if they do not perform compensable work.

The FLSA allows employers to round the clock-in and clock-out time of employees rather than paying by the minute. This DOL regulation is a vestige of older days when timekeeping mechanisms were less precise. Because timekeeping technology is more reliable and widely available today, it is recommended that employers use precise clock-in and clock-out methods when appropriate. However, if employers do choose to round time, they must be cautious to ensure that the policy is neutral on its face and neutral in practice—to round both in the favor of the employer and the employee at roughly an equal weight.

Under such circumstances, the rounding generally should average out so that employees are fully compensated for all the time they actually work. In practice, this means an employee's time should round up approximately as much as it rounds down. Even a facially neutral policy or procedure can be violative if, in effect, it does not average out to fully compensate employees for all time worked, or heavily favors the employer.

The regulations state that rounding to the nearest quarter of an hour will be accepted for enforcement purposes so long as it does not result in a failure to compensate employees properly for all time worked, over a period of time. This quarter of an hour rounding creates a line of demarcation of 7.5 minutes – e.g., rounding to the nearest 15-minute increment. For example, if an employee clocks in

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at 7:53 a.m., it is acceptable to round to 8:00 a.m., whereas, if the employee clocks in at 7:52 a.m., their start time should round to 7:45 a.m.

Employers should conduct regular audits to make sure their rounding policy, in practice, is rounding both in the favor of the employer and in favor of the employee at roughly an equal rate. Such audits will also help to ensure that rounding policies do not result in consistent underpayment to employees. Even a facially neutral rounding policy, which in practice has disproportionately benefited the employer and cumulatively underpays the employees, can be found to violate rounding rules under the FLSA.

Interrupted Meal Breaks

The FLSA does not require but generally allows unpaid meal breaks for non-exempt employees. Although the FLSA does not oblige employers to provide meal breaks, state laws may impose such obligations. If a meal break is uncompensated, employers must ensure that the break is uninterrupted and that no work is done during the meal break. Essentially, if the non-exempt employee is not paid for a time, they cannot work during that time.

The DOL differentiates ordinary rest breaks from meal breaks. Under the FLSA, employers must compensate for short rest breaks that last 20 minutes or less. However, employers do not have to compensate employees for a bona fide meal break, which ordinarily lasts at least 30 minutes. It is also important to note that state laws impose various requirements relating to meal breaks and the prescribed time may differ for employees in different states.

The DOL views these bona fide meal breaks as serving a different purpose than rest, snack or coffee breaks, and instead as true rest periods for regular meals during which the employee cannot work if they are not compensated. Importantly, the employee must be completely relieved from work duties during this uncompensated time and that break cannot be interrupted by work. For example, some cases have held that if employees are required to take their meal break at or near their workstations and periodically have to tend to their machine or help other workers

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during their meal break, that meal break has been interrupted by work and the entire meal break —not just the time where work was performed—becomes compensable. Class action lawsuits are often filed where an employer has loose rules that regularly allow these types of interruptions —regardless of the employer's intent.

To ensure compliance under these rules, employers should have policies and practices in place so that employees can take an uninterrupted meal break. As a best practice, meal breaks should be taken in a space away from the work site or station. Even when designated break sites are not possible, employers should have a reporting system in place for employees to record if their meal break is interrupted and then pay that employee for the meal break, or schedule a new meal break.

A well-communicated reporting policy where employees log their uninterrupted meal breaks is helpful in ensuring legal compliance and setting expectations. It can also go a long way to defeating a claim that the employer had a policy or practice that violated the FLSA in this respect.

Including Incentive Payments in the Regular Rate

The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their "regular rate" for all hours worked over 40 in a workweek. To determine the proper overtime rate, an employer must first determine the employee's "regular rate" of pay. The "regular rate" includes the employee's hourly rate plus any other non-discretionary bonus or compensation the employee received for that time period.

The FLSA requires that all payments to employees for hours worked, services rendered, or performance, be included in the "regular rate" unless the payment is specifically excluded in the Act. "Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift, and savings plans." However, non-discretionary bonuses, shift differential pay, and other incentive payments such as commissions should be

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included in the regular rate of pay calculation.

In practice, this means that for an employee who works 50 hours in a week, is paid an hourly rate of $10 per hour, and receives a $100 production bonus that week, that bonus must be included in their "regular rate." In the "regular rate" calculation, the $100 would be spread out over the 50 hours worked, e.g., $2 per hour. This raises the employee's regular rate from $10 per hour to $12 per hour. The employee in this scenario should be paid $480 ($12 x 40 hours) in straight pay and an additional $180 ($18 x 10 hours) in overtime pay. The total pay for the workweek should be $660.

This type of regular rate calculation should be done anytime a non-exempt employee is paid a non-discretionary bonus, shift differential, or incentive payment and they work overtime. If those payments are based on a longer period of time—i.e., a one-month commission or quarterly bonus—that payment must be averaged out over that longer time period. Even the smallest error or omission in these calculations can have significant consequences due to a multiplier effect. It is essential for employers to review their payment processes on the front end to ensure compliance before any small errors or omissions multiply out of control.

Independent Contractor Status Classification

The above wage and hour considerations such as compensability of time and overtime pay do not apply to independent contractors. However, the FLSA does not define the phrase "independent contractor," which generally refers to individuals who are in business for themselves and do not rely on one employer for work. Unfortunately, the legal standard for determining whether a worker is an independent contractor or a non-exempt employee subject to the FLSA has fluctuated throughout the years. Although courts have applied some version of an "economic reality test" for decades to determine whether a worker is an independent contractor, the factors used in this test have shifted. So, what is the applicable standard now?

On Oct. 13, 2022, the DOL issued a Proposed Rule stating that the regulations will return "to a totality-of-the-circumstances analysis

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of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity." While the Proposed Rule is not yet law as of the date of this publication, on Jan. 6, 2023, the National Labor Relations Board (NLRB) and the DOL entered into a Memorandum of Understanding stating these agencies' intent to enforce against misclassification of employees as independent contractors. Following this Memorandum, on June 13, 2023, in a decision referred to as The Atlanta Opera, Inc. (372 NLRB No. 95), the NLRB reversed its recent precedent, making it more difficult for individuals to be classified as independent contractors.

With Atlanta Opera, the NLRB returned to the standard adopted in its 2014 decision, FedEx Home Delivery, whereby entrepreneurial opportunity is but one factor among many geared toward discerning whether the evidence tends to show a supposed independent contractor is rendering services as part of an independent business. The standard prior to Atlanta Opera, which has been overturned, emphasized a worker's "entrepreneurial opportunity" for profit or loss when determining their employment status, rather than the totality-of-the-circumstances approach that has now resurfaced.

The NLRB returned to a number of non-exhaustive, common-law factors to determine whether an individual is an independent contractor, including:

- The extent of control that the company may exercise over the details of the work
- Whether the one employed is engaged in a distinct occupation or business
- The kind of occupation; any specialized skill required in the particular occupation
- Whether the employer or the individual supplies the instrumentalities, tools, and the place of work
- The length of time of the engagement
- The method of payment; whether the work is part of the regular business of the employer

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- Whether the parties believe they are creating an independent contractor relationship
- Whether the principal is or is not in business

Although the state of the law in this area is in flux, the general factors to keep in mind are whether the contractor is dependent on the company or not, whether they have an opportunity for profit or loss that is not dependent solely on the hours they work, whether they have specialized skills that are different than what the company does, and whether they use their own tools and equipment.

Conclusion

Understanding and addressing these wage and hour issues is critical for manufacturers to avoid large and protracted class and collective action litigation. When an employer makes a mistake in this area, it is usually not just with one employee but often impacts a large segment of the workforce. Addressing these issues on the front end to avoid a multiplier effect is key to risk containment.

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