Working Through Common Employment Law Issues (part III)

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Per Diems in the Oil & Gas Industry

The Fair Labor Standards Act ("FLSA") is a federal law that establishes minimum wage, overtime, record-keeping, and child labor requirements for employees in private business and in federal, state, and local governments. It is common for field employees in the oil and gas industry to be paid a per diem (or daily rate). Oil and gas companies often run afoul of the FLSA by not paying per diem employees overtime or by calculating overtime improperly. Here are some basic FLSA concepts, common mistakes made by oil and gas companies, and consequences for making a mistake.

Paying Employees a Per Diem or Daily Rate

The per diem is generally designed to compensate an employee for all hours worked for a particular day, no matter how many hours worked. Employees often like being paid a per diem because it is similar to receiving a salary and they do not have to worry about clocking in and out on a time system. Oil and gas companies generally like paying a per diem because it is a set amount paid per day and they do not have to keep track of an employee's hours worked.

Most employees who are paid a per diem are generally non-exempt under the FLSA. Non-exempt employees must be paid at least minimum wage for each hour worked and 1.5 times their regular rate of pay for every hour of compensable time worked over 40 hours per workweek (unless an overtime exemption applies). The current federal minimum wage is $7.25 per hour. Because per diems usually pay employees well above minimum wage, there is rarely a minimum wage violation.

The larger issue with per diems is overtime. A number of oil and gas companies who pay per diems will either not pay overtime or will calculate it incorrectly. If a worker who is receiving per diem pay is non-exempt under the FLSA, he or she is entitled to overtime for every hour of compensable time worked over 40 hours per workweek. To calculate overtime for an employee who is paid a per diem, following two-step process is used:

Step 1: Determine the Employee's Regular Hourly Rate
Regular Hourly Rate = All Compensation Received by an Employee in a Workweek / the No. of Hours Worked by the Employee during that Workweek

Step 2: Determine Amount of Overtime Owed
.5 x Regular Hourly Rate x No. of Hours Worked over 40 hours during that Workweek

The reason for paying a per diem employee overtime at .5 times his or her regular hourly rate (as opposed to 1.5 times the regular hourly rate) is because the per diem is designed to compensate the employee at straight time for all hours worked, including any overtime hours. Therefore, only .5 times the regular hourly rate for hours worked beyond 40 in the workweek must be added as overtime compensation.

Common Industry Practice Excuse and Consequences for FLSA Violations

Oil and gas companies often will say that it is common industry standard not to pay overtime to per diem employees, and that doing so will put them at a competitive disadvantage. The law does not see it the same way and judges are quick to remind an employer that just because everyone else is doing it, does not mean it is right.

Companies who refuse to pay overtime to per diem employees do so at their own peril. The Department of Labor regularly conducts investigations of oil and gas companies. It is common for the Department of Labor to show up unannounced at a work-site and demand that a company produce wage and hour records for all employees or for a particular set of employees. An investigation may be prompted by a complaint made by an employee or competitor or the Department of Labor may conduct the investigation on its own initiative. If it finds a violation, the Department of Labor may seek back wages, liquidated damages equal to the back wages, and civil money penalties. In extreme cases, an employer may also be subject to criminal penalties, including fines and imprisonment.

Even if the Department of Labor does not conduct an investigation, an employer faces the risk of being sued by an employee or group of employees. FLSA lawsuits can be highly disruptive to a business, and the consequences of a violation can be financially devastating. A company in violation of the FLSA must pay the employees' back wages, liquidated damages equal to the back wages, and attorney's fees and court costs. In addition, supervisors and managers (much to their surprise) generally are considered to be employers under the FLSA's expansive definition of an employer and can be held individually liable for an FLSA violation.

Moreover, the FLSA prohibits companies from retaliating against an employee who has filed an FLSA complaint or lawsuit or who has participated in an FLSA investigation or lawsuit. A natural reaction for an employer is to punish an employee who speaks up against the employer's interests. The FLSA recognizes this tendency and imposes very harsh consequences against an offending employer. Some of the remedies available to an employee who has been retaliated against include reinstatement, promotion, lost wages, liquidated damages equal to the lost wages, front pay, compensatory damages (such as mental anguish), mandatory attorney's fees, punitive damages, and pre-judgment interest.

This article is general in nature. If you need assistance in working your way through employment issues, you should contact an experienced labor and employment attorney.

This article is for informational purposes only and not for the purpose of providing legal advice. You should contact an attorney to obtain advice with respect to any particular issue.

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