The "Little Things" Can Cause Big Headaches for Employers

By Jonathan Fraser Light

An employer forgets to put the number of hours worked on a pay stub or rounds timeclock entries one minute in the wrong direction. Mistakes, even seemingly small ones like these, can lead to big losses for employers. Here are a few examples of such mistakes and some practical suggestions for remedying them.

• "Won't my payroll service protect me from improper payroll practices?" The answer is no. As a general rule, employers should not rely on their outside payroll services to keep them in compliance on these issues.

Payroll services usually calculate wages and pay employees in the manner in which they are specifically instructed by employers. The instructions may or may not comply with the law, and the payroll service likely will not take responsibility for instructions that are not in compliance. It is up to the employer to obtain the proper legal advice on these issues and then instruct the payroll service consistent with that advice. For example, one employer improperly paid its home health care workers a "per diem" flat rate of pay for a set number of hours worked each day, and which informally "factored in" overtime. The employer's pay stubs, despite being prepared by an outside payroll service, did not separately identify an hourly rate, overtime rate or hours worked at these rates.

According to California Labor Code Section 226, each of these items must be included on the pay stub. The state Division of Labor Standards Enforcement also cited the employer with significant overtime pay violations for failing to specifically identify when overtime was worked and how much was paid for it at the proper premium rate.

• "Is it legal to round payroll?" Employers are safe if they round both "back" and "forward" — sometimes favoring the employee and sometimes favoring the employer — in quarter-hour increments. Some timekeeping systems use exact minute calculations, so there is no danger of improper rounding practices. Other systems are programmed to round up or down to the nearest quarter hour, which the state finds acceptable.

For example, if the employee clocks in seven minutes early for an 8 a.m. start time, the system will round up to the top of the hour, benefiting the employer. If the employee clocks out at the end of the 5 p.m. workday at 5:08 p.m., the system automatically will round forward to 5:15 p.m., benefiting the employee. Note also that waiting in line to clock in, if de minimis, is not considered work time.

Meal breaks can be problematic with respect to rounding. Employees are usually told, often in an employee handbook, that they will be considered tardy if they clock out for more than 30 minutes for a meal break. But if the employee clocks in at 29 minutes, there is no guarantee that the Division of Labor Standards Enforcement won't find this to be an illegally short meal break. According to our informal sources, the Division of Labor Standards Enforcement does not allow rounding to 30 minutes in this example. Thus, employers should allow a short grace period for clocking back in after meals, even if it is done informally.

Some employers simply reduce a non-exempt employee's pay for the day by 30 minutes, without having the employee actually clock out and in for the meal. This is a dangerous practice, as it leaves the employer vulnerable to a claim that the employee either did not take the meal break or frequently had a shortened meal break. The employer could automatically deduct 30 minutes for a meal in the time system, but should still require employees to clock out and back in for meals (or record them in some other written fashion).

The employer's internal electronic timekeeping compilation protocol might ignore any recorded meals that extend out to as much as 35 minutes. In that example, the payroll system would simply default to 30 minutes.

• "What constitutes 'work time'?" Generally, any time the employee is under the control of the employer is considered work time. If employees are required to board a shuttle, bus or other form of transportation to get to a work site, such time will likely be considered work time even if no work is being performed.

Similarly, employees required to, or who make a habit of, stopping by a company equipment or supply yard before going to a work site (to pick up supplies or even "just to visit"), must be paid once they arrive at the yard and then travel to the actual work site. Employers often wrongly assume that because employees are not actually working at these times, they need not be paid.

If employees are cleaning up a work area, cleaning or putting away tools, or taking off safety equipment (or preparing to work, don safety equipment, etc.), this generally will all be considered compensable work time. De minimis time to change clothes, especially if changing is not required, need not be considered work time, and employees may be required to clock out beforehand.

Some employees have jobs that require them to wait for the next student for an hour of instruction, the next towing job (while waiting in the field or at the headquarters), or delivery persons waiting in the office for the next run. Employers often pay such employees "by the piece," but ignore the down time between "pieces." If the employee cannot work continuously from piece to piece, the employee generally must be paid at least minimum wage for the "waiting around" time.

Employers are not allowed to average the time for productive time (paid by the hour or the piece) and non-productive time (either not paid, or paid at below minimum wage). For example, tow truck drivers usually do not have a meaningful amount of time between tows to conduct personal business and thus must be compensated for the waiting time between tows. The industry standard is perhaps to the contrary, but that has not helped a few companies that have been audited by the Division of Labor Standards Enforcement.

Supervisors should be trained on a host of seemingly small wage and hour issues. They often are not and thus become the weakest link in an employer's defense against employment law claims.

In a 2005 California appellate decision, *Armenta v. Osmose*, the employee plaintiffs primarily drove trucks. When there was no work of that type available, they were paid below minimum wage for lesser chores such as washing vehicles and cleaning up the facility. The employer averaged all wages over the total time worked, which the court held was improper. Each hour must be considered on its own, and failure to pay at least minimum wage for the time spent performing lesser work resulted in a violation.

Note also that if piece rate employees (such as instructors or massage therapists) work overtime, they need to be compensated for that time. The overtime is calculated somewhat differently for piece rate employees than for hourly or salaried non-exempt employees, and employers should consult with their legal advisers on the differences.

• "What if my employees are simply 'on-call'?" If on-call or "stand-by" time is "uncontrolled," then it need not be compensated. This occurs when, for example, employees are on-call by pager or phone at night or on weekends and their activities are minimally regulated by the employer. Employees must have a reasonable time to get to the job site or respond to a call. Thirty minutes is perhaps the least amount of time that would be allowed based on various cases and agency opinions. In today's cell phone and pager-rich environment, on-call employees will likely have enough flexibility to conduct personal activities. This will enable employers to avoid compensating for such time.

Nevertheless, employers are free to compensate employees in any amount they desire for being on-call. For example, an employer may pay an employee $100 for being on-call over a weekend, and such pay need not average even a minimum hourly wage. The employee would be compensated separately for any actual hours worked, and those hours would have to be compensated at minimum wage or greater and include overtime premiums when applicable.

• "What should I tell my supervisors?" Supervisors should be trained on a host of seemingly small wage and hour issues. They often are not and thus become the weakest link in an employer's defense against employment law claims. An employer's senior management team or its human resources department may be unaware of seemingly small violations unwittingly allowed by mid-level supervisors.

For example, a supervisor at an outlying work site allows his crew to work five and a half hours before commencing a meal break to accommodate a very early morning start time. The one-hour meal break penalty will apply because the meal was not commenced by the end of the fifth hour of work, and the dollars can add up quickly. The issue could be even more problematic now that we are in limbo as to whether a one-year or three-year statute of limitation applies to meal and rest break penalties. The California Supreme Court will soon address the split of opinion among the state's appellate courts.

Supervisors also need to ensure that employees are not working "off the clock." Employees sometimes come in early and begin work. Knowing they aren't supposed to clock in before a certain time, they wait and clock in later.

Supervisors often ignore the problem because work is getting done and no budget-busting overtime is incurred. This will be counterproductive when a disgruntled employee files a class action lawsuit, citing all the off-the-clock work he and his co-workers performed. And as employers have seen from reading the newspaper accounts of multimillion-dollar settlements, a class action wage and hour claim is the ultimate budget-buster.

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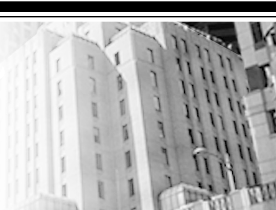

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