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How to Avoid Costly Improper Pay Practices: The $50 Million Question

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There are many questions, some of which can be very complex, that employers should evaluate in order to avoid potentially exorbitant costs associated with improper pay practices under the Fair Labor Standards Act (FLSA), federal regulations, and state laws.

In 2017, a national insurer settled a class action lawsuit filed against it in Connecticut under the FLSA wherein plaintiffs alleged they were due unpaid overtime. This $50 million settlement was the most expensive FLSA settlement in 2017.

TGI Friday's was also involved in a significant FLSA class action filed in a New York federal court. The plaintiffs alleged a number of purportedly improper pay practices, including that food service workers were not paid the proper minimum wage due to violations of the 80/20 rule applicable to tipped minimum wage, that tip-pooling restrictions were violated, and that employees were not paid for overtime work. TGI Friday's reached a settlement with plaintiffs for $19.1 million.

Approximately 28,000 exotic dancers from 64 different night clubs operated by Deja Vu Consulting, Inc. sued under the FLSA claiming that Deja Vu misclassified them as independent contractors rather than employees in order to avoid paying them minimum wage. Deja Vu settled for $6.5 million.

A multinational conglomerate was sued by technicians who worked for GE throughout the U.S. alleging that they were not allowed to include certain overtime hours on their time sheets, such as time traveling between jobs and time spent logging in to computers and responding to emails. GE reached a settlement with the plaintiffs for $9.5 million.

These and other substantial settlements associated with wage and hour class action litigation reveal the fiscal and legal risk that can befall employers whose pay practices are not in compliance. They also highlight questions that every employer should ask itself regarding its own pay practices.

When developing an approach to compensation that is compliant, fair, and sufficient to attract skilled workers, employers should evaluate the following:

- Do we have a sufficient time tracking program in place?
- Are there any special FLSA provisions applicable to our industry, such as the 80/20 rule applicable to tipped employees?
- Have we properly classified our employees under the FLSA?
- Do we have to pay our employees for travel time?

Other issues that could arise relate to bonus-payment structure, per-diem policies and practices, as well as call-in requirements and procedures. Per diems and bonuses could implicate an employer's calculation of the proper overtime rate to be paid when employees receiving such payments work more than 40 hours in a week.

Employers can also be subject to substantial costs due to audits by the Wage and Hour Division of the Department of Labor (DOL). The DOL can evaluate employer-compensation practices to determine compliance, which could result in damages, penalties, and fines. Zenefits, a human resources management company, agreed to pay $3.4 million after the DOL investigated its practices and concluded that it had misclassified account executives and sales representatives as exempt from minimum wage and overtime requirements.

Employers must remain vigilant in their approach to employee compensation to ensure compliance with the FLSA and other wage and hour regulations. The DOL has recently reinstituted the practice of issuing opinion letters, which serve as the official statement of the DOL's policy on certain pay practices. These opinion letters can serve as a valuable resource for employers in determining how to comply with these laws and regulations.

However, employers should also contact their counsel to ensure full compliance with the many rules and regulations related to proper compensation of employees and get the answers to these $50 million questions.