

ILLEGAL PAY PRACTICES TOUCH HOME

Thousands beginning to realize that employers are paying them incorrectly.

Increasingly, those in sales positions, assistant managers, healthcare workers, construction workers, brokers, administrative staff, service technicians/installers, telemarketers/call center employees, inside sales workers, and shift supervisors paid on a salary and/or commission basis (or employed as independent contractors) are filing lawsuits against their employers for overtime and minimum wage - and winning big. The government estimates that the percentage of employers misclassifying employees and paying them improperly could be as high as two-thirds in some industries. Indeed, it is extremely common that employees traditionally and openly compensated on a salary basis, on pure commission, or as contractors are in fact covered by the Fair Labor Standards Act and entitled to minimum wage, breaks, and overtime. Additional violations for "off the clock" work, automatic lunch deductions, and improper calculation of overtime are widespread. Further, it does not matter that the employee receives substantial compensation, or has agreed to the compensation package. Unless the employee meets a specific category of exemption (which is often not the case), the employee is entitled to additional compensation above and beyond what they already receive. In many respects, the more an employee has earned and the longer he has earned it, can adversely affect the employer by increasing the nature and extent of the potential damages.

While for years this remained a little known fact, the number of lawsuits is exploding. That is because employees are recouping enormous sums extending back multiple years and covering entire payrolls. Further, in many states, such as Maryland, employees are winning treble damages, meaning that whatever is owed is tripled as a penalty for non-payment. Added to this are personal liability for owners, and C-level employees, responsibility to pay employees' legal fees, and simplification of class-wide treatment. The cumulative result is that employers are highly vulnerable to such lawsuits and often forced into unfavorable class-wide settlements.

Surprisingly, while thousands of these cases are brought each year (and the number continues to increase), many (if not most) employers remain unaware or unwilling to address these misclassification issues. Often, such employers are simply unable to comprehend that employees traditionally treated as exempt from overtime or minimum wage, or employed as contractors, are in fact supposed to be treated as hourly W-2 employees. This misconception stems from decades of non-compliance with the Fair Labor Standards Act (the "Act") - a 1930's depression era Act, intended to create jobs. Largely unenforced since the 1960's, this legislation was virtually ignored until Congress attempted to make amendments in 2004. Unable to reach agreement to truly modernize the Act, Congress gave it a mere face lift, unleashing legislation based upon the economy of the 1930's, on current employers and employees. Combined with the recent financial upheaval (and the fact that employees who were also largely uninformed are becoming more knowledgeable of their rights) employees are increasingly taking advantage of the extremely favorable provisions of the Act, subjecting current and former employers to

expensive and often unwinnable lawsuits.

Many employers, reluctant to accept the reality of their vulnerability or too afraid of the cost of compliance, are unnecessarily exposing themselves to risk. Since the FLSA is form over substance legislation, small deviations in practices - that have little or no impact on overall compensation - can achieve compliance at almost no cost to the employer. Yet, at present, it appears that employees are taking more advantage of the FLSA than employers are taking proactive measures for protection.

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