

Wage and Hour Class Actions in Real Estate Industry: Traps for the Unwary

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Wage and hour class actions continue to plague employers throughout the United States. Such claims and individual suits are always fertile ground for plaintiffs' lawyers; however, employers of all sizes in the real estate industry can anticipate the variety of wage claims and employers' strategies in response.

Some of the most common areas employers in the real estate industry have exposure are paying the minimum wage and calculating time worked, among others.

Minimum Wage

Employers must follow federal minimum wage law (currently, \$7.25 per hour for non-exempt employees), which would be increased substantially, to \$15 an hour by 2025, under the Raise the Wage Act, a bill pending in Congress. In addition, various states and local jurisdictions already impose substantially higher minimum wages. Employers need to be familiar with the state and local laws where their properties are located. Where an employee is subject to local, state, and federal minimum wage laws, the employee is entitled to the higher minimum wage.

Calculation of Time Worked

Properly calculating hours worked can be tricky and can result in "off the clock" wage claims, creating significant back pay exposure for employers. Those problems include:

- a. *Failing to account for technology:* If employers require or permit employees to check emails and voice mails after hours for the next day's schedules and duties, then it is work for which employees should be compensated.
- b. *Working at home anomalies:* The COVID-19 pandemic has forced many employees to work from home. This greatly increases the potential for "off the clock" work. One problem area is computer boot up time. Employees whose time records are kept on their computers are claiming they should be paid for the time it takes to boot up their computers before they can log in and start their time records for the day. Employers without proper policies for working and recording time may face claims from employees working at home who contend the press of work required them to work hours of unrecorded and uncompensated time.
- c. *On-call time:* Property managers, security guards, and similar employees often are required to remain "on-call" for emergencies. Whether time spent "on-call" is compensable depends on a variety of factors, *e.g.*, whether employees have to remain at a set location while on-call, how much time they have to respond to emergency calls, whether they are required to report in uniform in an emergency, and so on.
- d. *Failure to relieve employees of duty during meal periods:* Like the on-call problem is the failure to provide duty-free meal periods for employees. For example, where a leasing office employee or a security guard is required to be available to perform services as needed during an unpaid lunch period, the lunch periods can turn into compensable time under the laws of many jurisdictions.

Calculation of Regular Rate of Pay

Overtime laws require premium pay for all hours worked in excess of 40 hours weekly and, in some jurisdictions, eight hours daily. Overtime is computed based on the regular rate of pay. The "regular rate of pay" includes sums paid and other forms of compensation, not just the hourly wage. For example, leasing consultants often are paid bonuses or commissions based on performance. Yet, some employers neglect to include those in the regular rate of pay when paying overtime, which can result in substantial back pay liability for employers.

Use of Independent Contractors

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Some employers have sought to avoid wage and hour and other employment law problems altogether by contracting out various functions, such as leasing, security, and cleaning and maintenance. However, if they exercise enough control over the working conditions and compensation of the employees of contractors, they can be considered responsible for their contractors' wage and hour problems. Moreover, some jurisdictions have legislated considerable limitations on the use of such contractors.

Unreimbursed Expenses

Where jurisdictions require employees be reimbursed for expenses, *e.g.*, vehicle use, cellphone use, and other similar charges, incurred in performing their work duties, class actions have been brought to recover such charges. This has been a particular problem during the COVID-19 pandemic, when so many employees working from home use their own cellphones, computers, and internet to perform their work.

These are some of the traps and pitfalls that can snare employers with regard to their pay practices and policies and highlight the need for annual wage and hour compliance audits to ensure practices and policies address specific organizational needs effectively and comply with applicable law.

Please contact a Jackson Lewis attorney if you have questions about the above or any other wage and hour issue.

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