Legal Update Article

How Construction Employers Can Avoid Common Wage & Hour Claims

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Employer wage and hour violations of the Fair Labor Standards Act (FLSA) and other applicable state laws are some of the most frequent in the construction industry. They are often the costliest an employer can make. However, common mistakes can be avoided with a careful review of wage and hour practices for compliance. Below are five common bases seen in federal wage and hour claims. Keep in mind that state laws can impose additional compliance requirements.

Compensable Time

Generally, an employer must pay an employee for all time suffered or permitted to work. Failure to pay for all time worked, whether straight time or overtime, can lead to numerous claims. Whether a non-exempt employee's time is compensable turns on whether the time spent was primarily for the benefit of the employer. Typical questions in the construction industry include:

- Should an employee still be paid while not actively working because of a mechanical issue or delay? Yes. Generally, an employee must be compensated for the time they are required to wait while on duty.
- Should an employee be paid for short rest breaks? Yes. Short rest periods (less than 20 minutes) should be compensated. Meal periods lasting at least 30 minutes are typically not compensable, however.
- Could an employee's overtime hours for one week be banked for another workweek as "comp time"? No. Employees are entitled to overtime for each week in which the overtime is worked.
- Should an employee be paid for traveling between job sites during the day? Yes. Time spent traveling from job site to job site during the workday typically must be counted as hours worked.

Independent Contractor Misclassification

Determining whether to classify workers as employees or independent contractors, sometimes referred to as 1099 workers, can be challenging. Consider these questions when making this decision:

- Does your company or the individual worker have the right to control the means and manner of production?
- Is the worker's opportunity for profit or loss based on their own managerial skills?
- Does your company or the individual worker supply the equipment or materials

used to accomplish the job?

- What is the amount of skill, initiative, or judgment required in this role?
- How permanent is the relationship?
- Is the job being performed integral to the company's business?

As an example, consider a worker who completes drywall installation, or another task, regularly for a company across multiple job sites. If this worker does not maintain their own business, interact directly with the company's client, has no say over how or when the task will be done, or provide their own materials, they would likely be classified as an employee. However, a worker doing the same task on various projects but for different companies, who also maintains their own drywall installation business, works directly with the client, sets their own hours and deadlines, and provides their own materials is more likely to be an independent contractor.

These are the factors the Department of Labor (DOL) set out in a rule issued in January 2024. Although, the rule is facing numerous legal challenges. Several federal circuit courts have set their own criteria for defining independent contractors under the FLSA, though. Keep in mind, though, that a number of states have more rigid requirements for identifying a worker as an independent contractor rather than employee, and the more employee-protective test will control.

Joint Employer

Joint-employer status has become an increasing concern for construction industry employers, especially those using temporary staffing or labor companies, or those working with prime or subcontractors on a job. If an entity is deemed a joint employer of a group of workers, it can be held jointly liable for wage and hour violations as to those workers.

Although there is no bright-line rule as to when a company will be considered a joint employer for FLSA purposes, the National Labor Relations Board issued a rule in 2023 explaining an entity is a joint employer with another employer if the two share or codetermine employees' "essential terms and conditions of employment." The seven essential terms and conditions are:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- The assignment of duties to be performed;
- The supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- The tenure of employment, including hiring and discharge; and

- Working conditions related to the safety and health of employees.

The right to control at least one of these essential terms and conditions may be given weight in deciding whether control is actually exercised, or such control is direct or indirect. Construction industry worksites often operate with general and prime contractors exercising certain control over lower-tier subcontractor's employees, usually to coordinate overall work and ensure uniformity of site rules.

Although the Board's rule has been recently vacated by a District Court, the Board has signaled it will continue to consider options for addressing its joint employer standards. This could come in the form of additional rulemaking or the Board addressing the issue in the individual cases before it. As such, employers should continue monitoring developments and consider the ways in which their agreements with subcontractors, or staffing or labor companies could reflect control, or expose them to risks.

Federal Contracts

Many construction industry contracts are subject to federal laws, such as the Davis-Bacon Act (DBA). In 2023, the DOL issued a final rule that:

- Redefined the term "prevailing wage" for workers and returned to a three-step process for determining what the prevailing wage will be for workers in the same classification and area. First, if most workers are paid the same rate, that rate is the prevailing wage. Second, if no majority rate exists, then the wage rate paid to at least 30 percent of workers will be the prevailing wage. Third, if no wage rate is paid to at least 30 percent of workers, then the weighted average rate is the prevailing wage.

- Codified the requirement that fringe benefits should be annualized.

- Required recordkeeping for at least three years after all work on the prime contract is completed.

- Included an anti-retaliation provision adding remedies such as reinstatement, front pay, backpay, and compensatory damages.

For employers with contracts subject to the DBA, this rule should be considered for covered employees. In addition, various executive orders applicable to federal contractors, such as those concerning higher minimum wage rates, pay transparency, and hiring of existing employees for follow on contractors create additional compliance requirements for construction industry employers.

Exempt Status

It is common in the construction industry for employers to classify their construction site non-craft employees as exempt from the FLSA's minimum wage and overtime requirements. For example, an employer might choose to make their project superintendents, civil engineers, and office employees who perform administrative work salaried employees. However, to be exempt, employees must fall into at least one FLSA exemption classification (such as executive, professional, or administrative) and meet the standard salary level. The DOL's 2024 rule increased the standard

salary level to $844 per week as of July 1, 2024, and will increase to $1,128 per week as of January 1, 2025. As a result, employers should consider whether their employees are still eligible to be exempt under the new salary levels.

While the rule went into effect on July 1, 2024, for most employees throughout the country, the DOL was recently enjoined from enforcing the rule as to Texas government employees. There remain other legal challenges to the rule as well that could impact its future.

Keep in mind as well that in addition to meeting salary requirements, the exempt employee must also meet the duties test for their classification in order to be exempt. The duties tests remain the same at the moment although DOL's ability to promulgate regulations as to duties requirements is currently the subject of ongoing litigation.

Contact a Jackson Lewis attorney if you have questions about compliance with wage and hour laws.