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Strategy & Insights

Energy Employment Law Group

Guidance For Employers In The Energy Industry To Avoid Common Wage & Hour Traps (Part 2)

The Department of Labor continues to intensify its scrutiny of employers in the energy industry, looking for violations of the Fair Labor Standards Act's overtime requirements. The DOL's investigations have resulted in several large settlements—not to mention unwanted media attention that has led to private collective- and class-action lawsuits against energy-sector employers.

In our last guidance *memo*, we explained how the DOL is focusing on specific issues, including (1) misclassifying employees as independent contractors, (2) failing to include bonuses when calculating the overtime rate, and (3) using improper day-rate plans. In this paper, we identify three more wage-and-hour problems that are common in the energy industry: (4) paying for scheduled time instead of actual time; (5) failing to properly pay for travel time; and (6) mischaracterization of per diem pay. For each issue, we offer real-world solutions to help employers avoid DOL enforcement action and private lawsuits.

TRAP NO. 4: PAYING FOR SCHEDULED TIME INSTEAD OF ACTUAL TIME

Instead of using employee-initiated time-recording methods (electronic swipe cards or paper time records), some employers rely on pre-populated schedules or standard shift patterns to calculate their employees' work hours each week. While convenient, these shortcuts may result in significant liability. The FLSA and state wage-hour laws require employers to keep a record of **all hours worked** each day and to pay overtime for **all hours worked** over forty each workweek. In addition, some state wage-payment laws impose liability for "gap time" claims—that is, uncompensated work hours that are not overtime. Because of these requirements, employees must be paid for their **actual time worked**, not just the time for which they are scheduled, pre-approved, or asked to work by the employer.

But how can you tell if your employees are working beyond their scheduled work hours or if they are not recording their time accurately? Or how can you determine if a rogue manager is making improper edits to employee time records to avoid overtime? Here are some suggestions to help you identify these potential problems and help you accurately capture employees' work hours.

Identifying "Time Shaving" and Other Red Flags in Timekeeping Records

Employers should take proactive steps to ensure that employees are not intentionally falsifying their time records. Employers should also ensure that managers are paying employees for all hours worked and not "shaving" time or making other improper edits to timecards to avoid paying overtime. To avoid these problems, consider having your managers and payroll administrators regularly review time records for the following red flags:

- Employee or manager edits that result in work hours matching a predetermined shift pattern or schedule;

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- Edits that remove or reduce overtime hours;
- Edits that move time worked from one workweek to another;
- A large number of time entries or edits being made by the manager instead of the employee;
- A large number of edits adding unpaid lunch breaks or edits that automatically deduct time for lunch (if your timekeeping system does not include automatic deductions for meal breaks);
- The majority of edits being made to revise down, rather than up, the total number of hours worked by the employee; and
- One employee working significantly more or significantly less overtime than other employees who have the same job duties and who work under the same manager (a sign that the employee or his peers may be working off the clock).

A Common Red Flag in the Energy Industry: The Repeating Eight

Most employees do not work exactly the same schedule or the same number of hours every day. Thus, if you find timekeeping records that repeatedly match a predetermined shift pattern or schedule, or that repeat a precise eight-hour workday each day, there is a good chance that the employees are not recording their work time accurately. For example, many employees in the energy industry submit time records with repeating 8-hour work days, starting and ending at the same times each day with a precise one-hour lunch break in the middle. Prudent employers should question the accuracy of such timekeeping records—the DOL certainly will.

Managers and payroll administrators should review employee time records regularly to ensure that they accurately capture the employees' actual hours worked instead of a predetermined schedule or shift pattern. Employers should also require nonexempt employees to record their actual hours worked precisely, capturing their start and end times to the minute. This does not mean that employers must pay for employees to clock in early and wait until their shift starts. Instead, employees should clock in when they are about to start their work. To avoid unintended exposure for potential off-the-clock work, consider carefully the placement of and number of time clocks your employees may use.

Responding to Common Timekeeping Red Flags

Finding one or more of these red flags does not necessarily mean that you have a rogue manager forcing employees to work off the clock or that you have a rogue employee who is intentionally falsifying timecards. But when these issues are spotted, further investigation is warranted to determine whether the edits have a legitimate explanation or whether they indicate potential wage-hour violations. If you find that an employee's timecards do not accurately capture the actual hours worked, you should pay any wages owed, take appropriate remedial action with regard to the offending manager or employee, and consider providing additional training to reinforce your company's lawful timekeeping practices and policies.

You can also reduce the risk of potential off-the-clock claims by requiring nonexempt employees to verify the accuracy of their time records. Having employees sign or initial the accuracy of each timecard is powerful evidence in subsequent litigation or DOL investigation. If an employee later claims to have worked off the clock, he will be forced to contradict his prior verifications, damaging his credibility and making any claim for unpaid overtime that much more difficult. To avoid the appearance of improper edits or "time shaving," also consider having employees verify any post-submission edits or modifications to their time records. Also make sure to provide a method for employees to make corrections to timecards if necessary.

> QUICK TIP: The following FLSA regulations are most relevant to the issues discussed above: 29 C.F.R. § 778.107 (overtime pay requirement); § 785.11 (work not requested but "suffered or permitted" is work time; if the employer knows or has reason to believe that the employee is continuing to work after his shift, the time is compensable work time); § 785.12 (if the employer knows or has reason to believe that work away from the work site is being performed, he must count the time as hours worked); § 785.13 (management must exercise its control and see that work is not performed if it does not want it to be performed); § 516.2 (recordkeeping requirements).

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TRAP NO. 5: FAILING TO PROPERLY PAY FOR TRAVEL TIME

Time spent commuting between home and work at the beginning and end of each workday is generally not considered compensable work time under the FLSA. Even if an employee is staying at a hotel or trailer near a worksite, the time the employee spends traveling between the hotel and the worksite at the start and end of each shift is not normally considered compensable time.

If the employee is using a company vehicle, the Employment Commute Flexibility Act ("ECFA") comes into play. Under the ECFA, home-to-work travel may become compensable if it is outside the normal commuting area for the employer's business or establishment. The DOL will generally not question the scope of the employer's normal commuting area, "unless the [travel] time involved is extraordinary." U.S. Dep't Lab. Op. Ltr. (January 29, 1999). Even so, employers have significant latitude here; some have successfully argued that commutes lasting several hours are normal and thus non-compensable. *See, e.g., Smith v. Aztec Well Serv'g Co.*, 462 F.3d 1274, 1288-90 (10th Cir. 2006) (commutes of up to three and half hours non-compensable); *Vega v. Gaspar,* 36 F.3d 417, 424 (5th Cir. 1994) (daily commutes of up to four hours were non-compensable).

Beware of the "Continuous Workday" Doctrine

Under the "continuous workday" doctrine, once the workday begins, any subsequent activities, including commuting, count as compensable time within that same workday. Thus, once an employee arrives at the worksite and begins working, any travel from worksite to worksite is considered compensable. Moreover, if an employee performs work-related activities at home before beginning the first commute of the day, then both the time spent performing the work-related activities at home and the subsequent commute time may become compensable.

For instance, if a group of employees must attend a pre-shift safety meeting away from the worksite, any subsequent time spent traveling to the worksite may be compensable. Other common activities that may implicate the continuous-workday doctrine include loading tools and equipment, stopping at the shop to pick up a crew, sending and responding to work-related e-mails and phone calls, and accessing and reviewing job information for the day.

To determine whether these activities will trigger the beginning of a continuous workday, courts focus on whether they are "integral and indispensable" to the employer's principal activities. If they are, then they may trigger the beginning of the workday, and subsequent time spent traveling to work may be compensable. The DOL and courts will generally find that activities are integral and indispensable with the employer's principal activities if they involve more than a *de minimis* amount of time and are performed for the benefit of the employer.

There is no bright-line rule to determine whether the time spent on an activity is *de minimis*. In addition to the amount of time involved, courts consider how difficult it would be to record the time, and the regularity with which the activity is performed. Courts have fairly consistently held that time is not *de minimis* if it exceeds 15 minutes. But even when the time is less than 15 minutes, a court may find that it is not *de minimis* if it is a regular part of the employee's work and is easily recordable.

To minimize the risk of commuting time becoming compensable, employers should consider the following:

- To the extent possible, prohibit employees from performing work-related activities at home. Implement policies instructing employees that they should only send and respond to e-mails, hold safety meetings, make and receive phone calls, complete paperwork, and perform other work-related activities while in the field—i.e., after they arrive at the job site.
- Allow time during the workday for all work-related activities that might otherwise be performed at home. Leave unscheduled time in the workday for employees to perform all of their work-related activities from the field. If your field employees must receive shipments of parts or supplies at their homes, instruct them to leave the items in the unopened

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shipping boxes until they arrive at the job site (but remember, if they spend sufficient time loading the boxes, then that activity might trigger the beginning of the workday). The best practice is to have the packages shipped directly to the job site.

- If your employees visit several job locations each day, provide appointment information to them while they are in the field or through an automated download process. Sometimes, field employees spend time at home obtaining appointment information and mapping out driving routes. If possible, provide them with information about their first appointment, if not all appointments, before the end of the prior workday. Alternatively, if you have the technology, provide field employees with real-time downloads of appointment information.

TRAP NO. 6: MISCHARACTERIZATION OF PER DIEM PAY

Per diem pay is common in the energy industry—particularly with oilfield-service employers. Employees working in remote locations for extended periods often receive per diem pay to cover their travel and living expenses (e.g., food, hotel, and RV-park fees). Because the per diem pay is considered a reimbursement for business expenses, it is typically a separate line item on a payroll check, distinct from straight-time pay and overtime pay. While per diem pay has its benefits (namely, it eliminates the administrative burden of submitting and approving receipts and expense reports), it can also create significant overtime exposure to employers who are unaware of the FLSA's limitations on the use of such pay.

Why Is This Important?

The DOL recently announced a settlement for nearly $2 million with an energy-sector employer for failing to factor per diem pay into its employees' overtime pay. In that case, the DOL alleged the employer was paying a per diem to employees who were not actually incurring reimbursable expenses and then excluding those payments from their overtime wage calculations. In the ensuing press release, the DOL criticized the employer's use of per diem pay, emphasizing that "Employers cannot avoid their legal responsibility to pay overtime by using evasive practices that seek to undermine labor laws and deny workers their rightful wages."

Per Diem Pay Should Be A Reasonable Approximation of Expenses

The first step in calculating overtime pay is to calculate the employee's "regular rate" for the workweek at issue—any errors in the regular rate will result in cascading errors that render any overtime calculations inaccurate. Under the FLSA, the default rule is that all compensation must be factored into the regular-rate calculation. Per diem payments, however, may be excluded if they are "reasonable payments for … expenses, incurred by an employee in furtherance of his employer's interest and properly reimbursable by the employer."

This "reasonableness" issue arises frequently in litigation. If the per diem pay is excessive, then the excess portion must be included in the employee's regular rate when calculating overtime pay. Here is an example:

> Assume an employee is paid $10 per hour and works six 10-hour days during the workweek. The employee's regular wages for the workweek would be $400 ($10 x 40 hours) and his overtime wages for the week would be $300 ($10 x 1.5 x 20 hours).
>
> Now assume the employee also receives a $400 per diem, and that a court determines that a reasonable per diem amount would have been only $250. In that case, the $150 excess should have been included in the regular rate. To calculate the additional overtime pay owed, the employer must first transform the excess per diem pay to an hourly rate. This is done by dividing the excess per diem pay ($150) by the total hours worked during the workweek (60 hours), which comes to an hourly amount of $2.50 per hour. The rate for the additional overtime pay is one-half of this amount, or $1.25. Accordingly, in this example, the employee would be entitled to the $400 in per diem pay plus an additional $25 in additional overtime pay ($1.25 x 20 hours).

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Compliance Tips

The DOL will look for certain red flags when examining per diem pay. If the employer provides handsome per diem payments but pays wages that are far below the prevailing wage for similarly-skilled workers, the DOL may view the arrangement as an attempt to circumvent overtime-pay requirements. In such cases, the DOL may apply heightened scrutiny when examining whether the per diem pay is a reasonable approximation of the employee's actual expenses. Another red flag is per diem pay that fluctuates with the number of hours worked. According to the DOL's Field Operations Handbook, "if the amount of per diem [pay] is based upon and thus varies with the number of hours worked per day or week, such payments are part of the regular rate in their entirety."

Here are a few steps employers should take to ensure that their per diem pay practices are compliant with the FLSA.

- Only provide per diem pay for certain employees, during certain timeframes. Make sure your per diem pay is provided only to employees who actually incur reimbursable expenses. During downtime (sometimes referred to as shop time), your employees probably won't incur any expenses. In such cases, they should not receive per diem pay (or if they do, it should be included in their regular rate when calculating overtime).
- Per diem pay should be a fixed sum per day. Remember, the DOL takes the position that per diem pay that fluctuates with the number of hours worked must be included in the regular rate when computing overtime.
- Periodically recalibrate your per diem pay. Periodically ask field employees to track and report actual expenses. Review those expenses and adjust per diem going forward. Not only will this help demonstrate that your per diem pay is a reasonable approximation of actual expenses; it will also prove that you are exercising good faith to comply with the law.

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