

COVID-19 Is Going to Get Your Company Sued for Wage Payment Mistakes

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Beginning in March of 2020, companies everywhere were forced to comply with local shelter and closure orders, as well as alter their operations to respond to the negative economic fallout from COVID-19. Companies rushed to keep their businesses going by implementing new, essential and often untested business practices.

Common changes businesses made to their workforce included temporarily furloughing employees, reducing employee hours, reducing employee pay and having all or more employees work from home. While these four strategies have in many ways become part of the “new normal”, prior to COVID-19, many employers did not frequently implement these measures and as a result of their unfamiliarity with such strategies, made mistakes.

In particular, furloughs, hour and pay reductions and widespread work from home can result in unknowing wage and hour violations. These mistakes are particularly problematic given that both Rhode Island’s and Massachusetts’ wage laws carry with them automatic and mandatory treble damages. To make matters worse, under federal law, Rhode Island law and Massachusetts law, a successful employee in a wage and hour action is entitled to their attorney’s fees, which can be the largest portion of damages. Finally, employers often implemented these practices on a widespread basis, making grounds for a class or collective action particularly fertile.

Thus, employers everywhere are well advised to stop double checking whether their floor tape is a full six feet apart out of fear of a lawsuit based upon virus spread and start double checking whether they have the appropriate protections in place against what is likely to become the latest wage and hour lawsuit trend.

1. Your Hourly Workers are Working (Too Much) from Home.

Exempt, salaried employees have been working from home for a long time and often access company emails and systems on their home equipment and phones. Prior to COVID-19, non-exempt, hourly employees often did not access communications from home, starting their day when they turned on their computer after arriving to work and ending their day when shutting down to catch their train home.

With COVID-19, employers everywhere started providing employees, regardless of their exempt status, the ability to work from home. Without the ability to see when these employees start and finish their day, a real opportunity to work outside of normal working hours arose. Compounding this problem is that employees may be more incentivized to work out of both the fear of losing their job and the lack of other things to do given the COVID-19 climate.

Unfortunately, non-exempt employees, unlike their exempt, salaried counterparts, must be paid time and a half for all hours worked over 40 hours per week. In addition, a fair amount of Rhode Island hourly employees must still be paid time and a half for work on Sunday (with a very small fraction still being subject to the Massachusetts blue laws). Importantly, this stands true *even when the employer is not instructing the employees to work additional hours*. In other words, if your employee is doing the work, you owe the time.

Overtime is not the only risk that has popped up from nonexempt employee work during this time. Non-exempt employees are generally paid on an hourly basis. In many industries, employers dictate a set amount of hours the employee is expected to work, such as 35 hours per week, and expect employees to clock-in and clock-out accordingly. However, due to COVID-19, some employee’s hours were cut back to a part-time basis. This

practice was particularly common in both Rhode Island and Massachusetts, because employers could cut an employee's pay and time in a manner that made their employees eligible for a small amount of state unemployment benefits, in turn automatically qualifying the employee for the full \$600 federal unemployment benefit. Thus, the part-time work, part-time unemployment benefit was a classic "win-win" – many employees could net more compensation while only a fraction of the compensation was coming from the employer. Unfortunately, employers who knew employees were getting the same or more in compensation were more likely to expect or allow extra work, as it did not seem unfair to have the employee work more than the newly lowered hours target. Further, employees were often more willing to work beyond their new, lower designated hourly target as they were netting similar or more compensation.

2. Your Exempt Employees are No Longer Exempt

Given that COVID-19 sometimes resulted in a lack of work and the desire to save expenses, along with the unemployment benefit "win-win" discussed previously, wage cuts – with or without hours cuts – became much more commonplace. These wage cuts particularly effected salaried, exempt employees. In the COVID-19 focused world, some employers forgot that on January 1, 2020, the salary basis test for the administrative, professional and executive exemptions of the Fair Labor Standards Act ("FLSA") – the exemptions which the vast majority of employers rely when classifying an employee as exempt – increased to an annualized salary of \$35,568 per year. When pay cuts resulted in a lower salary being paid, such employees should have been converted to hourly. Importantly, there is no "part time" salary basis test. In other words, a pre-COVID salary of \$65,000 per year, designed to compensate an employee for 40 hours of work, that is cut to \$32,500 for half the work, is still illegal under the FLSA. Thus, some employers unknowing lost the exempt status for these part-time salaried employees, resulting in the failure to collect time sheets and pay based upon hours worked.

3. Your Furloughed Employees are Working

A furloughed employee is essentially an employee who remains on payroll on an unpaid leave of absence. Prior to COVID-19, furloughs would happen during plant closures or rare other events, but most employers did not commonly implement furloughs. An absolutely essential part of any furlough is that employees *cannot perform work*, as they are not being paid.

However, furloughed employees during COVID-19 are expecting to be called back by their employers and still may have little other job opportunities or recreational activities available to them to pass the time on a furlough. In addition, more so than any other time, employers allowed such employees to keep their company laptops, phones and other equipment. The reason for this otherwise odd decision stemmed from the fact that collecting such equipment may have been impractical during shelter/closure orders, the employer may have had little use for the equipment during the furlough and the decision may have been viewed as more generous to the employees. Even more unprecedented was that some employers also allowed the furloughed employees to remain on company emails and log into company systems despite being on furlough. Employers may have done this given they did not know when the employee would be called back and may have been unprepared to cut off access. Employees may have also requested the access to use personal accounts set up through the company email with more ease.

The potential pitfall with this arrangement is that either employers or the employees are tempted to have the employees continue doing work. Employees may be doing this given they are being compensated through unemployment, are willing and eager to "pitch in" in hopes of elevating chances of being called back or are bored. Or it simply may be too hard to ignore a work email when they see it come in. Executive employees and high-level employees are even more likely to work for free during furlough. Unfortunately, unless the tasks are truly de minimis (i.e., only a few minutes every so often) these tasks are working time that must be paid. The receipt of unemployment insurance funds in no way mitigates the wage and hour violation risk or counts as wages. Again, with all working time laws, if the work is being done, even without instruction, it must be paid.

What to do Now

There are several things your Company should do now to reduce the likelihood of a successful lawsuit by employees who have completed work without pay:

- Require hourly workers to report their actual hours of work versus assuming they are working certain hours. Employees will have a harder time later claiming they were working unexpected hours if they actively submit their time records to the contrary. If your hourly employees did not do that previously, ask them to review your records and verify the records are correct.
- Call your hourly workers back to physically work in the office as soon as possible and practicable and discontinue access to emails and company systems outside of the office.
- Train supervisors not to call, text or email employees off hours. Before COVID-19, an executive may have emailed her assistant at 7:30pm the night before, so her assistant saw the email first thing in the morning when they came in. But now that her assistant is working from home, they may log onto their computer before bed and read the email (thus performing work). If that assistant is not recording that extra time, there is real exposure.
- Communicate clear expectations that all non-exempt employees must receive prior approval prior to working above their allotted hours through a written policy and discipline employees that work beyond those hours.
- Train managers to report emails, phone calls and text messages received by non-exempt employees on days and hours the employees should not be working or any furloughed employee.
- Ask IT to run reports to see how often non-exempt employees and furloughed employees (if access continues during furloughs) are logging in to company systems or sending work emails. Be sure your company has the proper policy explaining there is no privacy rights on such systems (and implement a policy if you do not have one).
- Require furloughed employees to set out of office messages indicating they are on furlough and have their emails forwarded to someone else. Consider cutting off work emails and access to company property for furloughed employees and collecting phones and computers.
- Prohibit any work from being performed during a furlough in your furlough notice (and send a reminder to those employees already furloughed).
- Implement mandatory, individual arbitration agreements for employee claims, including specifically wage and hour claims.

Big Picture

While you cannot go back in time, you can fix problems going forward. In addition, you can get the documentation regarding past work now that could be helpful in a future lawsuit. Act fast, as some of these employees may have to be terminated in the coming months, especially as PPP loans run out. As employee terminations increase, the risk of lawsuits also increases. Finally, consult with your employment attorney today to determine the best way to address any possible past and future wage and hour violations that may have occurred as a result of the transitions forced by the COVID-19 pandemic, and to find solutions that reduce any risk for your company.

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