HEFFERNAN
INSURANCE BROKERS
Because You're Different

News You Can Use

Feb. 2015 Volume 3, Issue 4

RISK MANAGEMENT

Wage and Hour Lawsuits to Continue Growing

AS THE NUMBER of class-action wage and hour lawsuits continues increasing, employers need to be especially careful about complying with laws both at the federal and state levels.

A recent report by the law firm Seyfarth Shaw shows that the number of wage and hour cases filed throughout the country increased to 8,066 last year, up from 7,882 in 2013, largely the result of statutes making it easier for plaintiffs to sue their employers.

But that small jump pales in comparison to the 400% increase in federal wage and hour lawsuits filed nationally since 2000. On top of that, state courts have also experienced high volumes of wage and hour cases, especially in California, New York, Illinois and Massachusetts.

According to the report, the 2nd and 9th Circuit Courts are "hotbeds" of Fair Labor Standards Act litigation and more class actions are certified by these courts than any other circuit courts in the country. The 2nd Circuit Court covers Connecticut, New York and Vermont. The 9th District covers California.

Still, all of the courts combined certified FLSA class-action suits 70% of the time, and in 50% of the cases the plaintiffs successfully fought attempts by the defendants to decertify the cases.

The report also predicts that wage-hour litigations will continue to rise this year.

That's because the Department of Labor (DOL) has increased the number of wage and hour investigators auditing employers' pay practices and is initiating enforcement actions with greater frequency.

Most employers recognize that under the FLSA they must pay hourly employees 1.5 times the employees' hourly wage for hours worked in excess of 40 hours per week – overtime pay.

However, some employers are unaware that the overtime rates are higher for employees that earn commissions or bonuses, and many are also surprised when they learn that salaried employees or employees with professional degrees (for example, engineers) are not automatically exempt from the overtime pay requirements.

It is this confusion or lack of in-depth understanding of the complexity of the act that has caused some of even the most diligent of employers to run afoul of the FLSA and of equivalent state wage and hour laws, which typically provide greater protection and broader remedies for employees.

See 'Revisit' on page 2

Contact Us

HEFFERNAN
INSURANCE BROKERS

If you have any questions regarding your coverage or our products, please call us at one of our offices:

Walnut Creek
San Francisco
Menlo Park
Portland
St. Louis
Petaluma
Los Angeles
Orange County
New York

Sales: 877-731-7905
Service: 800-234-6787

HUMAN RESOURCES

Smartphones and the Wage and Hour Dilemma

DO YOU EVER wonder if your non-exempt employees are sneaking a peek at work e-mail off the clock? Do they feel pressured to respond to calls and e-mails after the workday ends?

If they do, it could spell trouble for your organization.

The proliferation of smartphones has led to a rapidly rising number of lawsuits by employees claiming they were required to work uncompensated on evenings and weekends when not on the clock.

The lawsuits are often class actions stemming from overtime-eligible employees using smartphones to extend their workday without those after-hours tasks being compensated.

The class action danger

The problem for employers is that when one employee complains to the Labor Department that they are not being compensated for time working on their smartphones when away from work, the agency's investigators won't stop with the complaining employee.

They also look at how many others are "similarly situated."

A single employee's complaint can turn in to a class action when other similarly situated employees are included.

Just a few minutes a day over months or years can add up if employees regularly use their phones for uncompensated work.

In the last several years, the courts have seen a flood of lawsuits in which groups of employees claim the time they spend reading and responding to e-mail should be considered work time, and therefore paid.

When employees sue, employers typically use the *de minimis* defense, but that's a dead end. Here's why:

De minimis means very little, perhaps just a minute or two. Just five minutes a day adds up to almost a half hour a week. There are precedent-setting court decisions that have said that even 30 minutes extra a week is not *de minimis*.

Additionally, you may not even know that some employees are checking work e-mail at home whether they're told to or not.

An employer doesn't have to require employees to answer e-mail and perform other tasks off the clock to run into trouble. Merely permitting work without counting it as compensable time, puts the employer at risk.

What should you do?

The extension of work time made possible by smartphones and other electronic devices poses a new danger for employers.

To ensure you don't' find yourself the target of a wage and hour lawsuit, you need to put in place a solid policy about non-exempt employees working on their smartphone after hours.

You should put the policy in place, communicate it to your staff in a meeting, as well as include the policy in your employee handbook.

Passing out a memo on the matter is also helpful.

Once the policy has been communicated, you must monitor and survey staff to make sure they are not breaching the rules. ❖

Continued from page 1

Revisit Your Policies to Ensure Compliance

In addition to private lawsuits brought by employees, the DOL and state attorneys general have set their sights on enforcement of wage and hour laws. In May 2011, for example, the DOL announced the launch of its first smartphone application, an electronic timesheet that allows employees to track their work hours, including meal breaks and rest periods.

The information gathered via the timesheet "could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records," the DOL said.

If you are an employer in California, you have additional risks:

- Civil penalties – generally $100 per employee per pay period for a first violation, and twice that for further violations – for failures to comply with the California Labor Code and the IWC Wage Orders,
- Employees can step into the shoes of the state labor commissioner, under the Private Attorneys General Act (PAGA), to collect these civil penalties, and to keep, as a bounty, 25% of the take, and
- PAGA claims can be filed on behalf of all aggrieved employees even when the plaintiff cannot satisfy requirements for a class action.

The takeaway

Review and modify your wage-hour policies on classifications like exempt staff and independent contractors and working-time issues.

Revisit California's wage and hour laws covering overtime and meal breaks and fix any deficiencies in your policies.

Talk to us about an employment practices liability insurance policy, which can cover many costs associated with a wage and hour lawsuit.

Is employment practices liability coverage right for you? Call us:

877-731-7905

WORKPLACE SAFETY

Are You Preventing the Most Common Injuries?

THE FIVE leading causes of workplace injuries accounted for about 65% of workers' compensation costs in 2012, according to new research by Liberty Mutual Group Inc.

The results, published in the Liberty Mutual Research Institute for Safety's "2014 Workplace Safety Index," found that overexertion – or injuries related to lifting, pushing, pulling, holding, carrying or throwing – was the top cause of workplace injury in 2012. Overexertion injury claims cost U.S. employers $15.1 billion that year, or 25% of all workplace injury costs, according to the study.

This index is a good tool for employers as it helps businesses understand the nature of the majority of workplace injuries. With this information in hand, you can put in place safeguards in your workplace to reduce the likelihood of injuries. ❖

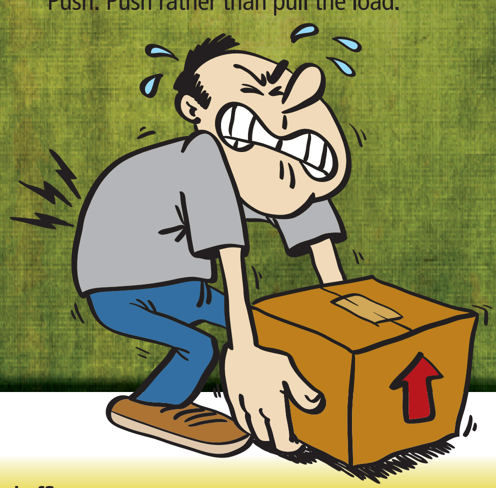
Preventing Overexertion

When your workers handle materials:

- Have a handling plan that avoids slippery hazards and includes a destination.
- Test the load to ensure that it can be safely carried.
- If the load is too heavy, awkward or bulky to carry alone, the worker should get help.
- Use machinery or equipment, such as pushcarts, hand trucks, forklifts or hoists.
- When possible, use levers, incline planes or rollers to move loads.

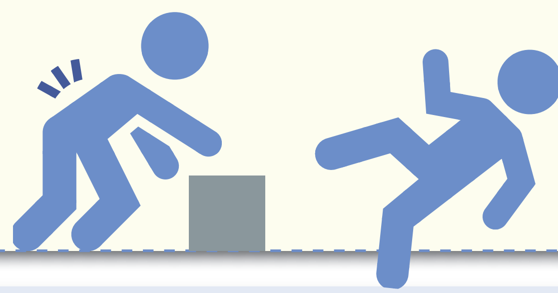
Guidelines for safe lifting:

- Get a good grip. Grasp the load firmly. Use gloves if they allow for a better grip.
- Get strong footing. Center body weight to provide a line of thrust and good balance.
- Keep it close. Grasp the load firmly and lift towards the belt buckle. Hold the load close to the body to avoid putting pressure on the back.
- Lift smoothly. Raise, carry and lower the load smoothly. Never jerk a load.
- Avoid twisting. If turning is required while lifting or carrying a load, turn the feet and body instead of twisting the back.
- Push. Push rather than pull the load.



10 Leading Injuries by Cost

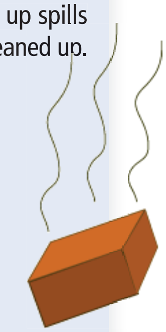
1. *Overexertion*: Total cost in U.S.: $15.1 billion (25.3% of all workplace injury costs).
2. *Falls on same level*: Total cost: $9.2 billion (15.4%).
3. *Struck by object or equipment*: Total cost: $5.3 billion (9%).
4. *Falls to lower level*: Total cost: $5 billion (8.6%).
5. *Other exertions or bodily reactions*: Total cost: $4.3 billion (7.2%).
6. *Roadway incidents involving motorized land vehicle*: Total cost: $3.2 billion (5.3%).
7. *Slip or trip without fall*: Total cost: $2.2 billion (3.6%).
8. *Caught in/compressed by equipment or objects*: Total cost: $2.1 billion (3.5%).
9. *Repetitive motions involving micro-tasks*: Total cost: $1.8 billion (3%).
10. *Struck against object or equipment*: Total cost: $1.76 billion (2.9%).



Falls

To avoid injuries:

- Maintain a workplace free of clutter and assign staff to make sure the work area is tidy.
- Eliminate wet or slippery surfaces if possible. Clean up spills immediately and make others aware of spills until cleaned up.
- Avoid creating obstacles in aisles and walkways.
- Ensure that you have proper lighting in all areas.
- Make sure workers have the proper shoes.



Struck by objects

A few ways to reduce struck-by injuries are:

- Wear hardhats to avoid being injured by falling objects.
- Stack materials properly to prevent sliding, falling or collapse.
- Always wear proper PPE. This includes safety glasses, goggles and face shields, to name a few.
- Don't work under cranes, hoists or heavy machinery while it's being operated.
- To avoid incidents with vehicles, workers should wear seat belts, check vehicles thoroughly and wear visible clothing.

WORKPLACE LIABILITY

Beware of the ACA Whistleblower Complaint

BY NOW you should be aware of the various penalties that can be levied against employers for not providing health insurance to their full-time employees once the employer mandate takes full effect.

But are you aware of another liability contained in the Affordable Care Act – the whistleblower complaint?

The task of investigating whistleblower complaints is the responsibility of the federal Occupational Safety and Health Administration.

Employees that feel they've been wronged in terms of the ACA have 180 days to file an administrative complaint with the OSHA Whistleblower Directorate.

So far there have been no Department of Labor (DOL) administrative tribunals for an ACA whistleblower complaint. That's not surprising since the employer mandate has partly taken effect only this year for employers with 100 or more full-time or full-time equivalent employees.

While there have been no tribunals, the OSHA has received one complaint that was thrown out. Nonetheless, the case could be a reflection of what a complaint might look like in the future, after the employer mandate is fully implemented.

New Rule Book

THE ACA bars an employer from discharging, discriminating or retaliating against any employee because they have:

1. Received a tax credit or a subsidy for buying health coverage on a public exchange;
2. Provided, caused to be provided, or are about to provide or cause to be provided to the employer, the federal government or the state attorney general, information regarding a violation of Title I of the ACA;
3. Testified or are about to testify in a proceeding concerning an ACA violation. Or if they assisted or participated, or are about to assist or participate, in such a proceeding.
4. Objected to, or refused to participate in, any activity, policy, practice or assigned task that the employee reasonably believes was in violation of any provision of the ACA.

The case:

A woman employed as a "durational employee" by the Housing Authority of Columbus, GA, filed an ACA whistleblower complaint in August 2014.

She alleged that she was terminated in January 2014 – four months after she'd refused to sign and acknowledge that she understood "and agreed" with the terms of the company's policy on health coverage for employees.

Those were laid out in a letter she'd received in September 2013, which stated that durational employees were ineligible for participation in the employer's group health insurance plan and that only regular, full-time employees were eligible.

She said that after she had refused to sign, she received her first unsatisfactory performance evaluation and a significantly lower annual bonus based on the unsatisfactory review.

She alleged that adverse employment actions were the result of her refusal to accept the terms.

OSHA dismissed the complaint, on the grounds that it was filed too late – more than 180 days following the date of termination.

The woman appealed the decision to the DOL Office of Administrative Law, claiming that her complaint was timely because she had attempted, unsuccessfully, to file complaints within the 180-day statute of limitations with other federal agencies.

But the administrative law judge threw out the complaint, saying the employer could not be held liable for retaliation prior to the effective date of the employer mandate.

The takeaway:

The case illustrates the most likely scenario under which an employee may gain ACA whistleblower protection after this year.

Other whistleblower complaints likely to surface in 2016 would concern complaints of adverse employment actions taken after an employer receives notice that one or more of its employees qualified for a tax credit or a subsidy for purchasing health benefits through a public exchange.

However, all employee complaints must be filed within 180 days of an adverse employment action. ❖