

The SESCO Report

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Your "Human" Resource Since 1945

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Department of Labor – Wage-Hour Division Continues Assault on Employers

SESCO Management Consultants fully expected a "culture" change within the Department of Labor with their aggressive approach with employers as experienced over the last eight (8) years. Unfortunately, we are not seeing any relief for employers as Wage and Hour lawsuits and audits continue to explode nationwide. There are a number of reasons for this record activity to include:

1. Even though the proposed overtime rules (increase) in the exemption salary threshold to \$47,476 is on hold, employees compensated on a salaried basis are informed creating raised interest and more inquiries internally as well as through lawyers and the Department of Labor.
2. A 2016 U.S. Supreme Court ruling requires immaculate time records as employees now can use "sampling" to justify timekeeping lawsuits.
3. The outgoing Obama administration poured millions of additional labor budget dollars into increased Wage and Hour enforcement which means beefed up workplace scrutiny. There is no indication, unfortunately, that the Trump administration will rescind these enforcement initiatives.
4. The IRS has received additional enforcement monies as well to include

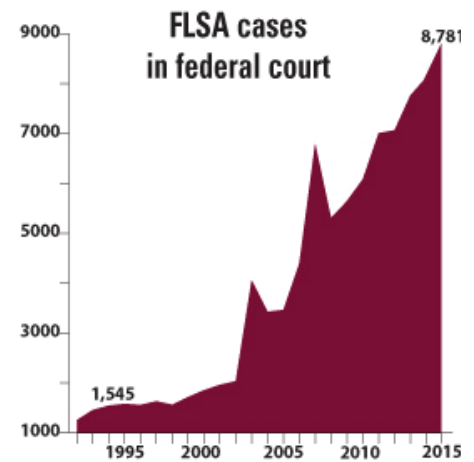
hiring 700 new enforcement agents who will be tasked with payroll audits verifying independent contractor relationships.

Although the Department of Labor will not "officially" admit that they are targeting various industries, there is no question that their random audits have increased due to the non-compliance and subsequent significant monies available in varying industries which include:

- Automotive Service/Convenience/Tire Shops
- Retail Automotive
- Long-Term Care
- Home Care
- Restaurants/Fast Food
- Manufacturing and Distribution
- Banking and Finance
- Contractors
- Plumbing/HVAC

What is most concerning to SESCO when we conduct Wage and Hour audits and/or assist our clients when being audited by the Federal or State Department of Labor officials is the lack of awareness to basic compliance requirements and how shocked employers are when they realize that, in fact, their time recordkeeping practices and pay plans are not in compliance. Common violations include:

- Misclassification of employees as exempt under the white-collar administrative, executive, professional (learned and creative) exemptions.
- Misclassification of workers as independent contractors (1099's).



Source: Seyfarth Shaw LLP

- Failure to pay for pre- and post-shift off-the-clock activities for non-exempt employees.
- Unpaid on-duty meal and rest breaks.
- Improper calculation of the regular rate to include failure to pay overtime on bonuses, incentives and spiffs.
- Failure to pay minimum wage due to travel and kickback rules.
- Failure to pay overtime to drivers who do not qualify for the exemption under the Motor Carrier Act and related laws.
- Improper tip and service charge practices.
- Inaccurate time records and improper pay deductions.

If you think that your pay plans are compliant, you are probably wrong as normally Wage and Hour will find an employer in non-compliance -- 83% of the time. Currently back wages average \$2,350

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ASSAULT ON EMPLOYERS

per employee and these are being “doubled” to address liquidated damages. Thus, the actual average per employee is over \$4,500.

Current cases of interest include:

- CKE Restaurants/Hardee’s - Sixty percent (60%) of CKE Restaurants investigated by the Department of Labor violated labor laws.
- Misclassification of employees as independent contractors - FedEx and UPS.
- The Walt Disney Company reached a settlement that will provide \$3.8 million in back wages.
- DOL audit of home care industry in Indiana resulted in 13 home care agencies paying 379 workers more than \$948,000 in back wages and damages.
- Department of Labor and Sonic signed an agreement to promote fair labor practices at franchises nationwide.
- U.S. Department of Labor conducting state surveys of construction projects to ensure proper payment of minimum wage and overtime.
- Nursing home chain to pay \$2 million in back wages and damages to 844 employees.
- Lifetime Fitness to pay \$976,000 in back wage damages to 15,000 employees in 26 states.

- Ashley Furniture franchise ordered to pay \$216,000 in back wages and penalties.
- Comcast to pay \$350,000 to 41 drivers, market contractors misclassified as independent contractors.

The intent of providing these examples is that even large, Fortune 500 companies are not in compliance with Wage and Hour regulations including proper classification of independent contractors. There are literally thousands of cases in the past 12 months with individual, smaller employers producing millions of dollars in back wage liability.

SESCO’s professional services provide for:

- On/offsite compliance audit reviewing all time records, pay plans and payroll practices to determine compliance with federal and state Wage and Hour rules and regulations.
- Representation of employers who are being audited by a Federal or State Wage and Hour office.
- Practical advice on establishing and maintaining not only compliant pay plans, but pay plans that are effective and affordable.

Contact SESCO to schedule your audit on a per diem basis or through our Professional Service Agreement.

Compliance Self-Audit

1. Are regular paydays established? This includes the company’s official 7-day workweek.
2. Are employees properly classified as exempt or non-exempt?
3. Are non-exempt employees being compensated for all overtime worked?
4. Are meal and rest period requirements complied with and documented?
5. Is all compensable work time tracked and compensated?
6. Is vacation accrual, use and payout tracked and compensated according to state law?
7. Has authorization been obtained for deductions from employee paychecks and are the deductions appropriate and allowed by state law?
8. When are commissions earned and paid, how are they calculated, and are they included in the regular rate for overtime purposes?
9. Are terminated employees paid their final wages in accordance with applicable state law?

The Realities of Background Checks

When it comes to selecting the best candidates, it is critical that employers conduct thorough interviews and assessments. When it comes to background checks, there are four (4) myths as well as four (4) realities.

Myth 1 - Background checks aren’t always necessary.

Reality - Eighteen percent (18%) of employers said they made a bad hire because they did not conduct a background check, bad news considering one (1) bad hire costs \$17,000 on average.

Myth 2 - All background check systems are created equal.

Reality - Twenty-nine percent (29%) of employers made a bad hire because they received bad information about the candidate. Fifteen percent (15%) have been sued because of background check related issues. Make sure your provider is accredited and complies with federal and state laws. **SESCO assists employers in conducting thorough and compliant background checks.**

Myth 3 - My background check system provides a good experience for candidates.

Reality - Sixty-five percent (65%) of employers have never tested their system themselves to see what their candidate experience is like. Not only is it important for employers to experience the process first hand, it is important to seek feedback from your candidates.

Myth 4 - Background checks typically take one (1) to two (2) weeks.

Reality - Background checks should be done in less than five (5) business days - SESCO’s background checks are conducted within 24 hours.

Test Yourself: How Would You Respond in These Situations?

Discipline is one of the most uncomfortable parts of a manager's job, and these days the increasing prospect of litigation makes it even more daunting.

How do you know you're doing the right thing?

Test yourself with these "discipline trouble shooter" case problems that just might crop up in your workplace:

1. You decide to terminate an employee who spent most of the day away from her workstation. You've warned her about absenteeism in the past, but you've also accommodated past requests from her for leave. She claims discrimination because she is from Mexico, and that a white co-worker had left her desk for hours without any consequences. Should you proceed with the termination?
 - a. Yes. She has a history of attendance problems, but her co-worker did not.
 - b. No. She is protected by the Civil Rights Act of 1964 and can point to the time you treated another worker more leniently.
 - c. No. Your granting her leave in the past offsets the hard line you're taking now.
2. A trusted team leader who reports to you wants to fire a female employee for poor performance. Her file is clean, but the team leader says her consistent errors have cost the company nearly \$100,000. However, he passed her over for a promotion because, he said, women aren't mechanically inclined to do that job. Your move?
 - a. Let him terminate, since her performance is such a grave problem.
 - b. Forbid him from terminating her because of his sexist comment. That remark will certainly come back to bite the company.
 - c. Investigate his allegations and find out why these problems aren't in her file.
3. On his lunch hour, an employee scans personal photos onto his computer. A female co-worker happens to see one of

his partially naked wife and complains to you about the "inappropriate" picture. You suspend him for a week, and he files a grievance. Should you reconsider?

- a. Yes. "Inappropriate" behavior is not the same as "offensive" behavior.
- b. No. A racy photo in the workplace cannot be tolerated, lest it creates a hostile work environment.
- c. Yes. But reduce the punishment to a stern reprimand.

Answers

1. In a purely legal context, A is acceptable, since you can show a real performance problem. Just be sure that all employees who break the attendance rule like that receive the same punishment. From a managerial perspective, avoid putting yourself in a place where you have to compare different favors you give to different employees. A sliding scale for meting out discipline will eventually stir up a discrimination case. Set standards and stick to them.
2. Do not let him fire her before you investigate (C), unless you want your organization to go to court. You should probably discipline him; either he's exasperating her problems, or he dropped

the ball on giving her an accurate performance review. Only after you have a documented record of poor performance can you - not your subordinate - terminate the employee. And don't forget to remind him - sternly - that you never want to hear any sexist comments in the workplace again.

3. C is probably best. A single photo that a co-worker "happens to see" does not a hostile work environment make. He may be guilty of misusing company property, but not necessarily of harassment or offensive behavior - although your company policy may for defensible reasons be very strict on this point.

Special Thanks to New SESCO Clients!

Kingsport Press Credit Union
Kingsport, TN

M.S. McClellan
Knoxville, TN

McGriff Industries, Inc.
Cullman, AL

Town of Clintwood
Clintwood, VA

Senior Living Services of Virginia, Inc.
Midlothian, VA

4 Rules of Progressive Discipline

Rule 1 - The object of progressive discipline should be to rehabilitate employees, not punish them. Always ask an employee for a reason behind the problem. Never take anything for granted or assume anything. Document everything that is said and done in case the problem persists and you have to go to the next disciplinary step.

Rule 2 - Employees must understand that their behavior violates company rules. Employment law differs from civil law in that "ignorance of law" can be used as a defense. Be thorough when you are disciplining employees. State exactly how the policy has been violated. Give clear-cut examples of what is unacceptable about the behavior. Set the standards to be met so the employees can't claim they didn't know they were doing something wrong.

Rule 3 - If employees are not warned about possible consequences of their behavior, a judge or arbitrator may see that as an indication that there hasn't been any effort at rehabilitation.

Rule 4 - Employees must be treated equally under the progressive discipline system. A manager can't slap one employee on the wrist, then boot another one out the door for the same offense.

Note: An employee must understand the reason for the penalty and be given a chance to correct the behavior, or the system is not progressive discipline.



P.O. Box 1848
Bristol, TN 37621
(423) 764-4127 • FAX (423) 764-5869
www.sescomgt.com
email: sesco@sescomgt.com

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SESCO Client Corner

National Funeral Directors Association

NFDA is the world's largest funeral service association, serving 19,700 individual members who represent more than 10,000 funeral homes in the United States and 49 countries around the world. NFDA is the trusted leader, beacon for ethics and the strongest advocate for the profession. NFDA is the association of choice because it offers funeral professionals comprehensive educational resources, tools to manage successful businesses, guidance to become pillars in their communities and the expertise to foster future generations of funeral professionals.

SESCO is proud to be retained by NFDA and those 19,700 individual members can contact SESCO without charge to discuss any human resource, management and leadership, or employment and labor law matter. SESCO is extremely proud to be retained by not only the profession's leading association, but one of the leading associations for businesses in the nation.

SESCO's Fall Seminar Series 2017

Bristol, VA

Courtyard by Marriott

November 7-8, 2017
Effective Leader/Manager

December 5-6, 2017
Human Resources -
Understanding the Basics

Richmond, VA

Virginia Community Healthcare Association

November 2-3, 2017
Effective Leader/Manager

November 28-29, 2017
Human Resources -
Understanding the Basics

(SESCO has partnered with one of our valued clients, Virginia Community Healthcare Association, to host our Richmond Seminar Series.)

Visit our website at www.sescomgt.com

State and National Business and Trade Associations, Chambers of Commerce and Human Resource Associations are welcome to contact SESCO to book a professional speaker for annual conventions and seminars. Contact Bill Ford at 423-764-4127 or by email bill@sescomgt.com.