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How to Avoid Violating Wage and Labor Laws

By Richard Koreto

Accountants who work as CFOs in small companies or have such companies as clients may find themselves pressed into service as de facto payroll managers. That brings them into contact with a bewildering array of wage and labor regulations.

And while accountants can't replace an attorney experienced in these issues, some knowledge of the basics can help them help their companies avoid serious errors. Federal and state enforcement is strict, and the fines can be enormous—a little knowledge can assist companies in staying on the straight and narrow.

AccountingWEB spoke recently with **Nicholas Fortuna, Esq., founder and managing partner of the law firm Allyn & Fortuna LLP in New York City.**

The main law affecting wage rules is the Fair Labor Standards Act of 1938, said Fortuna, although it's been extensively amended over the years by other laws, such as the Family and Medical Leave Act. It covers overtime issues, for example, an area full of potential violations.

Overtime for hourly workers has been much in the news with President Obama's recent proposals. (More on those, below.) These have highlighted the confusion in this area. Basically, hourly workers are entitled to time-and-a-half overtime pay after 40 hours—44 hours if they're residential workers, "But there are detailed rules, said Fortuna. "And you can get into a lot of trouble with these."

For example, the FLSA list the categories of employees who are exempt from the overtime requirements, Fortuna explained. Those employees are exempt if they fall into one of those categories—such as managerial or professional—and make at least $455 per week. If an employee does not fall into one of the enumerated categories, it doesn't matter how much the employee earns, overtime is required under the statute. (More details are available from the Department of Labor.)

"Also, don't think you can take an hourly worker and say 'poof—you're a manager. Now work 60 hours this week with no overtime pay.' That will get you into trouble." Another pitfall is pretending an employee is really an independent contractor to be paid on a 1099 form rather than a W-2 employee.

Accountants should review IRS guidance on this issue. But Fortuna sums it up neatly: "If you're supervising someone who is doing work at your facility, they're not an independent contractor."

Restaurants are "notorious" for violations, said Fortuna, so accountants with food service clients and employers should be extra-careful. Some of the pitfalls—which can occur in other industries as well—include improper averages. You can't work an employee 60 hours one week, 20 hours the next, and call it an average 40 hours. And you can't be an "exempted manager" if all you manage is a French fry machine.

It's the same story in retail stores: too often hourly sales associates become "assistant managers" to avoid overtime pay, even when they have no true managerial authority.

Gratuities are also subject to abuse. Although certain tip-compensated employees like waiters can be paid a lower minimum wage, if the employer puts them even part-time into non-tip positions, that could be a problem: one restaurant chain was hit with a multi-million dollar fine for that one.

Another industry that often falls afoul: tech start-ups. Fortuna said they're among "the biggest offenders." They believe everyone should work 24/7, telling the staff, "Oh, you'll get a piece of the business if we get funding." That's fine for the partners, but not for the rank-and-file.

Fortuna indicated that the seriousness of the violations could not be exaggerated. Fines can run to thousands of dollars per employee, he said, and courts are very lenient in allowing class-action lawsuits in wage and overtime disputes.

What Obama is proposing

The President is clearly going to expand the employees covered by overtime rules, said Fortuna. Among the proposals, as outlined in the New York Times, is a raise to the $455 ceiling and changes in definitions that could lead to far more workers eligible to collect overtime pay.

The article quoted economist Jared Bernstein as saying that increasing the overtime costs for employers would encourage them to hire more people working fewer hours, rather than working a small group extensively.

And that, said Fortuna, was a key motive for the original FLSA back in 1938.

Meanwhile, states have already taken the lead. As noted in the *Times*, in California, an employer must pay overtime to any salaried workers making less than $640, with recent legislation raising that to $800 in 2016. In New York, the threshold is $600 with a raise planned to $675.