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Timekeeping Systems May Hold Key to FLSA Litigation

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If a picture tells a thousand words, what you can see in timekeeping systems could make or break the story you want to tell. If you are litigating a case concerning violations of federal overtime laws don't fail to consider that today's sophisticated time and attendance systems could be a source of valuable positioning for your case.

The challenge is that you have to know where to look. Some attorneys don't focus enough on the area of time and attendance. They limit analysis of the timekeeping system data to number crunchers without including specialized timekeeping experts. This narrow view of the value of understanding timekeeping behaviors, processes, and systems does not surprise me, but it is a concern.

- Are the timekeeping processes/policies/behaviors or system setup reasonable and standard? Do they adequately support reporting and computing of time?
- Is there evidence the management of timekeeping or the systems have been designed or manipulated to suppress the reporting of time?

I was recently tendered as an expert witness on behalf of the defendant company in a class action overtime (FLSA) case. An expert in workforce management practices and technology can render opinions on the employer's timekeeping business practices and systems. Given that there are so many lawsuits in this area I'm surprised my plate is not full. It's clear that the legal community is not yet aware of the nuances and issues surrounding time reporting within these complex business processes and systems. Leveraging an understanding of what is possible, reasonable, and common practice within this business area could be powerful.

Significant gaps in areas of compliance and technology

Employers also often underestimate the significance of their own time and labor management business practices and technologies. The software developers and timekeeping device manufacturers have done a great job of supplying the market with increasingly feature rich solutions. While many employers have not kept pace and they under-manage the potential risks and abuses as well as the opportunities for operational excellence. This gap in understanding plays out in a number or ways.

By examining the time and labor management activities (e.g. training, user inputs, communication, and manager reviews) and system setup, you can build a story around what this important business function was designed to facilitate and where the employer sought to influence payroll expense. Timekeeping is the filter – the origins of control, the foundation of compliance, the manifestation of intent.

The software may be the same but the setup is unique

Every employer's time and attendance model is unique. It's a corporate "finger print" telling a story about how employees get paid. Even two identical software applications will not look and operate the same after they are configured. Don't get me wrong, there are some very common policies and processes in the industry. It's the outlier organizations that either under-manage this business area or abandon standard operating procedures that put organizations at risk.

Why is every timekeeping installation unique? Configuring today's sophisticated timekeeping systems is more of an art form than a set of strict software coding and setup guidelines. Few people realize the systems are constructed according to employer specifications and objectives which vary greatly from business to business and even among departments within the same business. While specifications for computing time are technical, directions for designing layout, reporting, and user access are much more *artistic*. Both processing rules and screen design give the installer latitude to craft a unique architecture with only very slight differences in outcomes; slight but not unimportant.

A timekeeping expert can analyze how the data was generated or influenced. It's not terribly difficult to I explain that Rex clocked in and out twice a day, typically at 8 a.m. and 4:30 p.m. and that those punch times produced X number of hours. One can easily count the number of times managers edited employees' timecards and compute a percent of occurrences.

What does require specialization and experience is an assessment of timekeeping configuration and an analysis of exactly how the rules counted and allocated hours or whether weighted average pay codes built into the rules are in compliance with the Fair Labor Standards Act. A timekeeping expert can attest to whether the system was built to support the close monitoring or suppression of overtime. Does the way the system is built allow or encourage managers to reduce total hours through manipulating an employee's timecard record? What does rule configuration reveal about what the employer wants to control? Assessing for intent requires evaluating the entire schema of practice and technology as a whole – looking for those unique combinations of rules, security settings, and on screen displays.

Simple Example: Call Back pay is a common practice in healthcare and manufacturing. Employees are often given a "minimum shift guarantee" of 2 to 4 hours for these Call Back shifts regardless of how many hours they work.

The worked portion of the Call Back shift should be paid as usual – at the base or contract rate for hours which do not exceed an overtime threshold and at the FLSA weighted average OT rate when they do.

What I find is that Call Back is often paid at 1.5 times the base rate. To a configuration analyst who designs the timekeeping system, this can mistakenly be interpreted to mean that the Call Back pay code can replace the Overtime pay code and still pay correctly. But it cannot.

The Call Back 1.5 x base pay code does NOT use the weighted average rate and thus, an employer can – intentionally or accidentally – underpay employees who work Call Back when they are in the overtime zone.

You cannot derive this analysis from payroll data because you don't know the computations within the timekeeping system. Only the hours coming FROM the timekeeping system, not how they were generated, are accessible in an examination of payroll or timecard data.

There are countless scenarios within timekeeping design that should be evaluated. To render an opinion about this area, you need to be a bit of a Profiler who is very familiar with timekeeping behavior and understands what conditions within the management practices, policies, system setup, and devices are conducive to questionable activities.

Strong motivation for mischief

A timekeeping system is the ONLY system that is touched by every employee of the company every day – sometimes several times in a day – and throughout the payroll process. The bottom line is what employees and managers do in the process directly impacts *the bottom line* – theirs and the company. No other financial business system is so exposed to human behavior. Labor expense is usually the company's largest single expense – sometimes as much as 60-75%. Likewise, for employees the paycheck is the largest source of income. It's not hard to imagine what happens when strong financial motivation on both sides combines with a highly complex system relying on hundreds, perhaps thousands of end users.

Payroll data doesn't tell the Timekeeping story

The client you are working for may use a timekeeping system that has a very good, or a very troubling story to tell. Take the time to look into the timekeeping and scheduling areas and catch them doing something right (or draw attention to the *absence* of evidence they use timekeeping functions to violate wage and hour regulations, union contracts and employee/employer trust).

If the story isn't all positive, the outcomes may have been unintentional. Payroll gaming and non-compliance could be the actions of employees that have found creative work-arounds to the reasonable and common controls put into place. I can certainly attest to that. (Note: Athena Enterprises has developed a proprietary Payroll Leakage Assessment[SM] of timekeeping management and systems uncovering remarkable empirical evidence that employees and managers are misusing and gaming systems to impact earnings and benefits.)

Example: A Payroll Leakage Assessment can determine if managers are using the timecard or scheduling application to creatively move hours from one pay bucket into another in what could be interpreted as suppression of hours or pay. These actions may not appear questionable in the audit trail or payroll data.

It's time to recognize that time and labor management systems are not the tools of a small department of payroll coordinators who can tightly administer compliance and ensure 100% accuracy. Timekeeping, attendance, and scheduling are complex, highly configurable business systems designed to be used by the general worker population. They are the conduit for computing and reporting time to payroll. Overlooking this business area doesn't tell the full story.

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