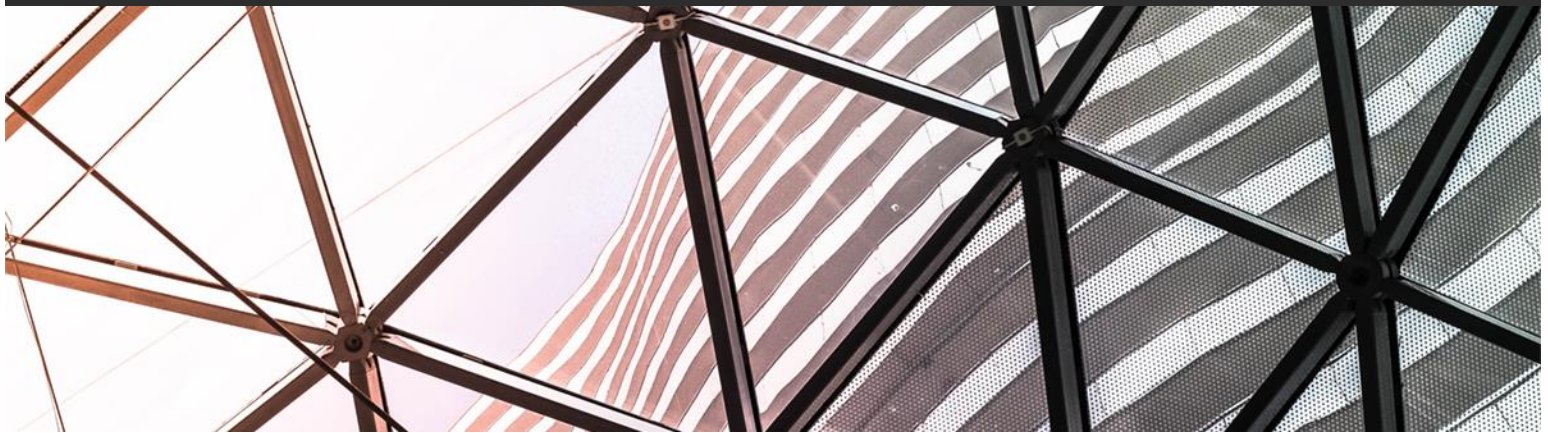


## Alert | Labor & Employment/Retail



November 2017

### Avoiding Holiday Season Employment Headaches

As the holiday season approaches, employees look forward to time with family, vacations, and holiday festivities, all of which can mean requesting more time off or calling in sick. For retailers, however, the holiday season typically means increased customer demand, staffing challenges, and potential for more wage and hour exposure. Given these issues – and potential liabilities! – below are a few tips for retailers to keep in mind that may help avoid holiday headaches that could last well into the New Year.

#### 1. Temporary workers, long-term problems?

In response to holiday shoppers and related seasonal demands, retailers may utilize a staffing company that specializes in temporary retail workers. While retailers may have to train and supervise these workers on company policies and procedures, they must be aware that this may create a double-edged sword. Hiring temporary workers can sometimes place retailers in a Catch 22: they must train and supervise these workers on company policies and practices to help mitigate wage and hour exposure, but such control may further expose them to theories of joint employment liability. To mitigate exposure, including from joint employment theories, retailers should first carefully review their contracts with staffing agencies to ensure that they contain representations and warranties that commit the *staffing agencies* to paying these employees in full compliance with all applicable wage-and-hour laws. Contracts should include provisions that ensure that temporary workers properly record all hours worked, do not perform off-the-clock work, are paid for all hours worked, including overtime, and take all requisite meal and rest breaks. The contract should also contain indemnification provisions by which the staffing company assumes both for defense of and liability in connection with any lawsuit that any temporary worker or group of temporary workers file against the retailer.

## 2. Ferris Bueller's Day Off.

Employees often call in sick on Black Friday, the day after Christmas, or New Years' Eve, when, arguably, employees are needed most. If the retailer operates in any of the increasingly numerous states, cities, or localities where paid sick leave (PSL) laws have been enacted, they must remember that when an employee calls in sick and wants to use PSL, most PSL laws both broadly define permissible use of PSL benefits, and significantly restrict employers in the amount of notice they can require, their ability to deny and/or retaliate against its use, and in the questions and/or verifications they can ask of employees using PSL. Some jurisdictions, such as Chicago and Pittsburgh, also prohibit "no fault" or "absence control" attendance policies from being applied to any employee using PSL. With that said, if a retailer has a good-faith reason to believe that an employee is abusing the policy and making a misrepresentation – *i.e.*, the employee who is "sick" posts a picture on social media depicting him or her out socializing that day – employer's may be able to take action against the employee. However, this becomes much harder to do in jurisdictions where PSL laws exist and retailers must be careful to ensure they are aware of the legal constraints now placed upon them in many places where they may have significant retail operations. In addition, the geographic patchwork of such laws means that one size will often not fit all when making decisions about how to deal with call-offs.

## 3. Overscheduling can be expensive.

Retailers surely know that they are required to pay hourly employees for all hours worked. However, retailers must sometimes also pay employees for ***not working***. For example, often, an employee may report to a retailer's store for a scheduled shift but is then sent home—either before working or prior to completion of shift—because of overstaffing or inclement weather. Nevertheless, the employee may be entitled to "reporting time" pay in varying amounts (*e.g.*, 2-4 hours) in states such as California, Connecticut, the District of Columbia, Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island. To complicate matters further, some cities, like San Francisco, require employers to provide employees with their schedules in advance of their shifts. If a retailer alters an employee's work schedule – in this case for staffing or inclement weather – a retailer may be required to pay nonexempt employees both for hours added and/or hours lost. Retailers with union workforces covered are often subject to similar obligations under collective bargaining agreements.

## 4. Recognize that cross-store staffing may unknowingly create overtime situations.

Retail management, in-house counsel, and human resources employees can probably say it in their sleep: under federal law, *hourly employees are entitled to overtime pay for all hours worked over 40 hours*. Applying this simple principle can become challenging, however, when an employee is working for the retailer at more than one store – a frequent practice at holiday time. Especially where each store assigns separate hours and maintains separate time records, pay systems need to be designed and administered to ensure that all hours worked by any given employee, regardless of store or location, are counted in the same bucket for purposes of calculating overtime. For example, an employee who works 21 hours at one store and 22 hours at another will generally be entitled to 3 hours of overtime. Retailers must also pay overtime compensation even if the overtime worked was not authorized. Retailers may still discipline an employee for violating a company policy by working unauthorized overtime, but failing to pay overtime is not a lawful option. Thus, if an employee works overtime without permission, retailers must pay the employee for the overtime hours, but may discipline the employee consistent with the retailer's disciplinary policy.

## 5. Consider restricting nonexempt employees from accessing company email.

Retailers are obligated by law to keep accurate records of the time worked by all nonexempt employees. When nonexempt retail employees have access to email, or carry a company phone, their work time includes time spent reviewing and responding to email. Especially during the holiday season, when coverage issues are continual, it may become both tempting and important to keep open email, or even text, communications with retail employees. Without proper systems to track the time employees spend using and responding to electronic communications, however, this practice may result in significant wage-and-hour liability. Eliminating such access reduces the likelihood that a nonexempt employee will engage in arguably compensable work (*i.e.*, retrieving, reading, listening, and/or responding to work-related tasks). Further, it may better position a retailer to argue that it did not require the employee to work, and that it did not have knowledge that the employee was working.

In short, as the holiday season approaches, retailers should review their wage-and-hour practices and policies to ensure that temporary, part-time, and full-time employees are all aware of and complying with them. Retailers are also encouraged to work with outside counsel to ensure their policies and practices are in compliance with federal and state wage-and-hour and state and local paid sick leave laws. Keeping these wage-and-hour scenarios in mind may help retailers mitigate a holiday season headache that can last well beyond the New Year.

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