Legal Update Article

Four Ways Manufacturing Employers Can Reduce Risk of Class Action Litigation

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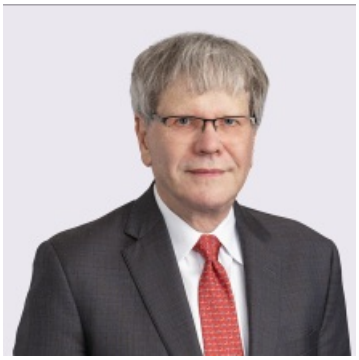

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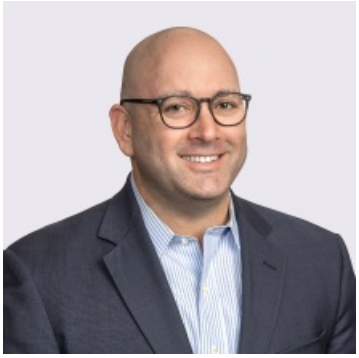

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While most employers' collective bargaining agreements (CBAs) require that class action grievances be submitted to an arbitrator for adjudication, employers in the manufacturing industry may want to consider extra precautions as special issues exist when employing large groups of employees working under the same conditions and schedules and in the same workspaces.

To lower the risk, manufacturing employers can consider directly addressing common issues in compensation, timekeeping, breaks, and alternative dispute resolution procedures with written wage and hour policies or work rules compliant with applicable federal, state, and local law.

Calculation of Overtime Premiums

In addition to provisions on the rates and calculation for overtime wages, many CBAs require payment of shift differentials or premiums to employees who work overnight and other less desirable shifts or bonuses for attendance or productivity. These are particularly common in manufacturing, where the two- or three-shift operations are the rule in order to maximize the use of the capital investment.

When shift differentials or bonuses are paid separately from the employee's regular earnings (*i.e.,* as a separate line item on the paystub), employers must factor them into the calculation of the "regular rate of pay" for overtime purposes and calculate overtime premiums using the proper formula. States often have their own requirements. In California, for example, there are different formulas to calculate overtime premiums owed for flat sum bonuses that are not measuring production, efficiency (*e.g.,* attendance bonuses), safety and traditional performance, efficiency, and so on.

Courts often decide to grant class certification to claims alleging miscalculation of overtime premiums where the same formula generally is applied to all employees and the costs to defend such claims can be considerable.

Time Rounding

Federal regulations followed by many states allow employers to round employees' time to the nearest five minutes or the nearest one-tenth or quarter of an hour. However, even if a neutral rounding policy is permitted by a CBA, employers must ensure the policy also is neutral as applied (*i.e.,* the rounding policy does not result in a failure to count as hours worked all the time employees have actually worked over a period).

Manufacturers that use rounding policies should periodically audit their employees' time records to ensure the rounding policy averages out over time and does not mistakenly advantage the company. Claims challenging the neutrality of a time rounding policy are granted class certification regularly because such policies typically are applied to and affect all non-exempt employees. Even if a CBA provides that employees may not "clock in"

before the starting time, manufacturers arguably must pay overtime if their employees are "suffered to perform work." The practice of particularly skilled employees of being at their workstations early to set up or working through lunch breaks is widespread at some manufacturers, and even flexibility in the CBA, if granted, may not avoid issues.

Meal and Rest Breaks

While CBAs often provide for meal or rest periods, many do not specify the procedures to be followed during breaks. Companies can provide more detailed rules and procedures in a separate employee handbook or standalone document. In some jurisdictions, the lack of a compliant written meal and rest break policy can subject a company to significant penalties. In California, for example, employers must provide breaks of specific lengths, at specific times, and pursuant to various rules, and employees have a private right of action to sue their employers for break violations.

Dispute Resolution Procedures

Unlike a traditional employment arbitration agreement covering all claims arising from the employment relationship and including a class action waiver, courts will not mandate the use of dispute resolution procedures "required" by a CBA for claims involving rights conferred on individual employees as a matter of state law. Instead, only claims involving rights or duties created by the CBA itself or that require an interpretation of the meaning of a contract term in the CBA for resolution will be subject to preemption. This means employees are free to file and pursue civil class action lawsuits involving most wage and hour claims in court. Thus, a manufacturer with a CBA can find itself defending a union grievance in arbitration, as well as a court lawsuit over issues that overlap.

Please contact a Jackson Lewis attorney with any questions about these and other workplace issues.