

Understanding the Legalities of Flextime

It seemed like a good idea at the time... How many apparently once-brilliant corporate initiatives have ended up being apologetically eulogized in this way? They say that policies are the scar tissue of past mistakes, and for many organizations strict and rigid work schedules are the sad result of an unsuccessful venture into the pitfall-laden realm of flextime.

The idea of flexible work arrangements has long had a seductive allure to both workers and management. And why not? Flextime is said to be good for morale and employee retention, and is even said to boost productivity. So what's the downside?

In recent years there have been a host of high-profile, multi-million dollar class action lawsuits charging major businesses with various forms of flextime abuse including discrimination and overtime pay violation.

But such litigation isn't limited solely to the big guys. Small and midsize organizations are equally vulnerable to flextime and pay-related lawsuits. In fact, a recent study by the Department of Labor estimates that almost half of all U.S. companies have misclassified workers as exempt from overtime, when in fact they are not. This is the core issue in most flextime-related litigation.

Reducing Flextime Liability

To fully comprehend the potential liabilities inherent in flextime policies, it's beneficial to understand that flexible work arrangements are affected by the federal Fair Labor Standards Act (FLSA), worker's compensation, The Occupational Safety and Health Act (OSHA), anti-discrimination laws, and a host of comparable (and often even more stringent) state legislation. So, without a very detailed, comprehensive, and proactive plan for implementing flextime, companies are apt to find themselves on thin ice a long way from shore.

Overtime Risk

Since it is the issue of the exempt versus the non-exempt employee that tends to generate the vast bulk of litigation, to avoid trouble, employers must determine with certainty just exactly who among their employees are *bound* to a 40-hour work week.

To qualify for overtime exemption under FLSA, an employee must be paid a salary and must fall into one of four main job categories as defined by the Department of Labor: *executive*, *professional*, *administrative*, or *outside sales*. If an employee's *primary* duties don't fit into one of these arenas, even though he or she may on occasion perform some of these functions, then that person is limited to a 40-hour week and must be paid overtime for work performed beyond that limit.

Consider the FLEXIBILITY of temporary staffing!

The danger area for many employers is in the area of the mid- to low-pay areas in the organizations where there are often overlapping tasks, such as the assistant manager who routinely performs the same kinds of work as those whom she supervises. Merely assigning a job title such as "manager" for example, is not sufficient for an organization to be able to legally categorize someone as an exempt employee.

Another criterion for exempt status is one of independence. In order to be considered exempt, an employee must function with a high degree of job autonomy. In essence, exempt workers are in charge of how they use their own time. They can't be docked for time off, and still be considered exempt. The organizational focus cannot be on the hours worked by an exempt employee. The Supreme Court has ruled that if an employer has a policy that permits or requires pay deductions for partial-day absences for exempt workers, they lose their status under the FLSA guidelines.

For non-exempt employees, flextime requires careful documentation of hours worked. While using flextime to allow an employee to work fewer hours (and be paid accordingly), typically poses a few problems; every hour beyond 40 must be compensated at overtime rates.

With exempt employees, the challenge is different. By definition, they're on a flexible schedule since they can't be docked for time off. Never require hours to be tracked for exempts--or you risk having them classified as non-exempts. Instead focus flextime policies on meeting project goals.

An Alternative Solution

So is flextime a good idea? It can be, under the right set of circumstances. But with litigation in the area becoming a cottage industry for opportunistic law firms, many organizations are continually looking for alternative ways to control payroll and administrative costs, while reducing worker burnout and stress.

One of the increasingly popular ways businesses have found to circumvent the flextime tar pit is through the use of temporary placement firms which can cost-effectively supply organizations with skilled workers capable of stepping in during peak times, vacation periods, and unexpected shifts in worker availability or production demand or other events that put stress on the company's efficiency.

Flexible work arrangements certainly have a place in today's work environment. They are often the best solution for a variety of vexing organizational challenges. But when wielded haphazardly, such policies can prove to be a problem greater than that which they had been originally implemented to fix. Options, such as the focused use of temporary personnel offer viable alternatives to such a complex and demanding tactical policy, and should be closely and carefully considered before making the leap into implementing an idea that, well... looked good at the time.

A "To Do" List for Flex Arrangements

(From Workforce Online at www.workforce.com)

- To avoid being unfair to specific groups such as women and minorities, create a specific written policy that explains what kinds of jobs are and aren't candidates for flexible arrangements.
- If an employee covered by the Americans with Disabilities Act (ADA) asks for a flexible work arrangement, review the request carefully. Telecommuting is a potential option for someone with a disability.
- Review the wording of your benefits policies to make sure that employees aren't accidentally rendered ineligible if they shorten their work weeks.
- For non-exempt employees: structure the schedule of a compressed workweek to ensure that it doesn't exceed 40 hours. If they telecommute, instruct them on the proper way to record their hours.
- For exempt employees: remember that tracking their hours is risky. It implies that they are hourly employees, and they may be legally treated as such.
- If an employee reports a workers' comp injury at home, get a detailed account of what work-related activities the employee was engaged in when he or she was injured.

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