What lies beneath. Three wage and hour dangers you may never see coming.

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On January 19, a federal district court in Arkansas paved the way for a jury to decide whether 2,000 employees were entitled to recover unpaid overtime for all weeks in which they worked more than 40 hours, while having 30-minute meal breaks automatically deducted from their work time.

The case settled a few days later. No word yet on how much that cost.

Two days earlier, a state court in California paved the way for a group of employees to recover back pay for time worked but improperly deducted because of their employer's "time rounding" policy.

No word yet on settlement.

Last year, a federal district court in New Mexico approved a $1.1M settlement for a group of employees who claimed that their employer failed to properly calculate their regular rate of pay for purposes of computing overtime pay.

What do these three cases have in common?

Each was based on a policy or practice embedded deep within the employer's timekeeping and payroll systems.

None turned on individualized fact-intensive assessments applicable to each employee. And that's a problem.

The essence of class and collective actions

Class and collective action lawsuits often get a lot of publicity. That's not surprising because they can be "bet the farm" cases with millions of dollars in damages on the line.

In a class or collective action for unpaid wages, one or more current or former employees file a lawsuit on behalf of themselves and all other similarly situated individuals.

There is no cap on the size of a class. Some have included more than 100,000 current and former employees.

Although the rules that apply to these cases are complex, their essence is relatively simple.

Proceeding on a class-wide basis is generally appropriate if a jury can decide the claims of all class members with common evidence.

To paraphrase the late, great Supreme Court Justice Antonin Scalia, that common proof is the glue that holds a class action together. It permits a jury to determine the issue of liability based on evidence that applies to all class members.

On the other hand, if the claims turn on facts unique to each class member, the case will break down into hundreds or even thousands of mini-trials and cannot be resolved on a class-wide basis.

With that introduction, let's take a look at our three cases.

Three class-wide wage and hour land mines just waiting to be triggered

Auto-deductions for meal breaks

There is nothing inherently unlawful about having a payroll system that automatically deducts 30 minutes of time each day for an unpaid meal break.

The belt-and-suspenders approach to these deductions includes (1) informing employees that they can request reversal of the deduction, and (2) providing the means (forms) needed to reverse the auto-deduction.

But doing so is no guarantee of protection against class certification or imposition of liability.

In the Arkansas case that settled in January, the employer had buckled its belt and snapped on its suspenders.

But the court still certified the case to proceed as a collective action because (1) the employees had presented substantial evidence of a company-wide practice of interrupting meal breaks, and – this part is crucial – (2) the company could show only seven instances in five years where it had reversed an auto-deduction.

With more than 2,000 employees, that paltry reversal rate probably wouldn't get anywhere with a jury.

Time rounding

Like automatic deductions for meal breaks, there is nothing inherently unlawful about rounding time to the nearest quarter hour.

A punch-in at five minutes before noon is recorded as noon. A punch-out at five minutes after noon is recorded as noon.

The belt-and-suspenders approach to using rounding systems is to ensure that the terms of the policy are neutral and do not result in systemic underpayments to employees. In other words, over time the rounding system cannot favor the employer at the expense of the employee.

In the California case decided in January, expert testimony showed that the rounding resulted in systemic underpayments to employees.

Regular rate calculations for overtime

Federal law, and the laws of many states, require that overtime be paid at the employee's regular rate of pay.

Despite your common-sense understanding of that term as being the hourly rate regularly paid to an employee, that's not how it's calculated. Instead, it is calculated by including *all* remuneration paid to an employee, subject to a few narrowly defined statutory exceptions.

Here's an example from the U.S. Department of Labor: Employee earns $12 an hour, works 46 hours in a week, and earns a production bonus of $46 for the week. The regular hourly rate of pay is not $12 an hour but $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13. That means the employee's overtime premium rate should be $6.50 rather than $6 an hour.) The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $12, plus the $46 production bonus, plus 6 hours at the $6.50 overtime premium).

In the New Mexico case that settled last year, certain additional forms of compensation were not included in calculating the regular rate, which meant that the calculation of overtime was also wrong.

The impact of a triggered land mine can be substantial

Automatic deductions, time rounding and failure to include all remuneration in regular rate/overtime calculations may be deeply engrained in your longstanding payroll practices and systems.

If they are, they may provide Justice Scalia's required "glue" for a class or collective action against your company. And use of the word "may" is probably being charitable.

If your company makes automatic deductions for meal breaks, and you want to keep doing so, you should conduct periodic audits to determine (1) whether the breaks are interrupted by work and, if so, (2) whether employees are making use of the right to seek reversal of the deductions. If the number of requested reversals is paltry in relation to the number of meal breaks involved, dig deeper.

If your company rounds time punches and does not want to record work time "minute to minute," you should conduct periodic audits to confirm that the rounding is not resulting in systemic underpayments to employees.

If your company does not include all non-discretionary remuneration in calculating your employees' regular rate of pay for overtime purposes, fix it – no ifs, ands, or buts. (Other than for a few narrowly defined exceptions.)

Don't think it can happen to you? Think again.

In the world of wage and hour litigation, automatic deductions, time-rounding, and regular rate calculations are low-hanging fruit for a plaintiff's attorney.

Consider the following scenario: Employee is hurt in an accident. Employee's attorney asks for copies of wage statements to use in collecting benefits, or as proof of damages in a lawsuit. The attorney notices regular, uniform deductions of time for meal periods. Or bonus payments not included in overtime calculations.

Trust me. Neither is hard to spot. At that point, you may be a couple of questions away from getting a class or collective action lawsuit for unpaid wages.