



The holiday season marks the busiest time of the year for retailers.

Filled with holiday cheer, many shoppers look forward to availing themselves of ever-enticing holiday deals. To fully capitalize on the most wonderful time of the year, many retailers expand their store hours and rush to hire seasonal employees to provide support for the annual surge in shopping and foot traffic. Though this is a joyous time, retailers should be mindful of inherent employment law risks to remain off the naughty list after the holiday season ends.

Here are a few tips to avoid common employment law pitfalls during the holiday rush.

Not all seasonal workers are contractors.

When retailers are looking to hire seasonal workers, it is important that they carefully consider whether these new elves are employees or independent contractors. During the chaos resulting from the holiday rush, retailers are susceptible to misclassification, which can result in potential exposure in the form of class-action lawsuits to recover unpaid wages and large statutory penalties, as well as tax penalties.

To avoid potential liability, retailers should assess whether to classify a new elf as an independent contractor. Part-time or defined-scope work does not mean the person is not an employee. One primary analysis is the degree of control retailers exercise over the individual and how the person performs the work. If the hiring entity dictates things like schedule, pay rates, dress code, and performance standards, that elf is likely an employee, even if they only work for a defined period. Retailers with questions about whether temporary hires should be classified as independent contractors or employees should contact counsel to evaluate on a case-by-case basis.

Include holiday pay in your employees' stockings.

In general, paid holidays are not required by federal or state law. So as an incentive for employees to work on holidays, retailers often offer their employees holiday premium pay. Under federal law, holiday incentive pay must be included in the regular rate of pay for purposes of calculating overtime unless the employee receives *both* full holiday pay and regular wages for working on the holiday. If an employee receives both full holiday pay and regular wages for all hours worked on the holiday, only the regular wages need to be factored in for the purpose of calculating the regular rate of pay for overtime or paid leave purposes.

One side note on this point: Additional “bonuses” in the stocking also might be included for the purpose of regular rate calculations if those bonuses are not discretionary. So things like shift differentials, sales incentives, or other incentives need to be included along with regular wages when calculating the regular rate for purposes of overtime or paid leave.

Schedule break time to keep up the holiday cheer.

With the surge in shoppers and sales both in-store and online, making time to slow down and taste the eggnog may be overlooked. However, not only is taking time to rest and recuperate imperative for mental health and employee morale, but meal and rest breaks are also required by law in many jurisdictions.

To best prepare for the holiday rush and ensure compliance with the law, retailers should include employee meal and rest break time in daily schedules. California retailers should also keep records of these breaks. This makes it easier to ensure premiums are paid if employees are unable to take meal and rest breaks.

Supervisors should also ensure that they schedule sufficient coverage and encourage employees to take those breaks. Having breaks on paper won't carry the day if, in reality, the press of business in the store prevents folks from taking them.

Don't forget to wrap up the holiday season.

Once the holiday rush is over and the seasonal employees' time with the retailer has come to an end, retailers should ensure that they comply with local state law requirements regarding final pay. Depending on the jurisdiction, this can mean an employer must have final paychecks ready on the last day of work (*e.g.*, California), on or before the next regular payday (*e.g.*, New York), or otherwise. In most places, if earned vacation or PTO is accrued, it must be paid out with the final paycheck.

Retailers who neglect to timely provide final pay open themselves to potential liability in the form of monetary penalties. Thus, retailers should prioritize the timely distribution of final paychecks once it's time to pack away those decorations.

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