

# PEO Insider®

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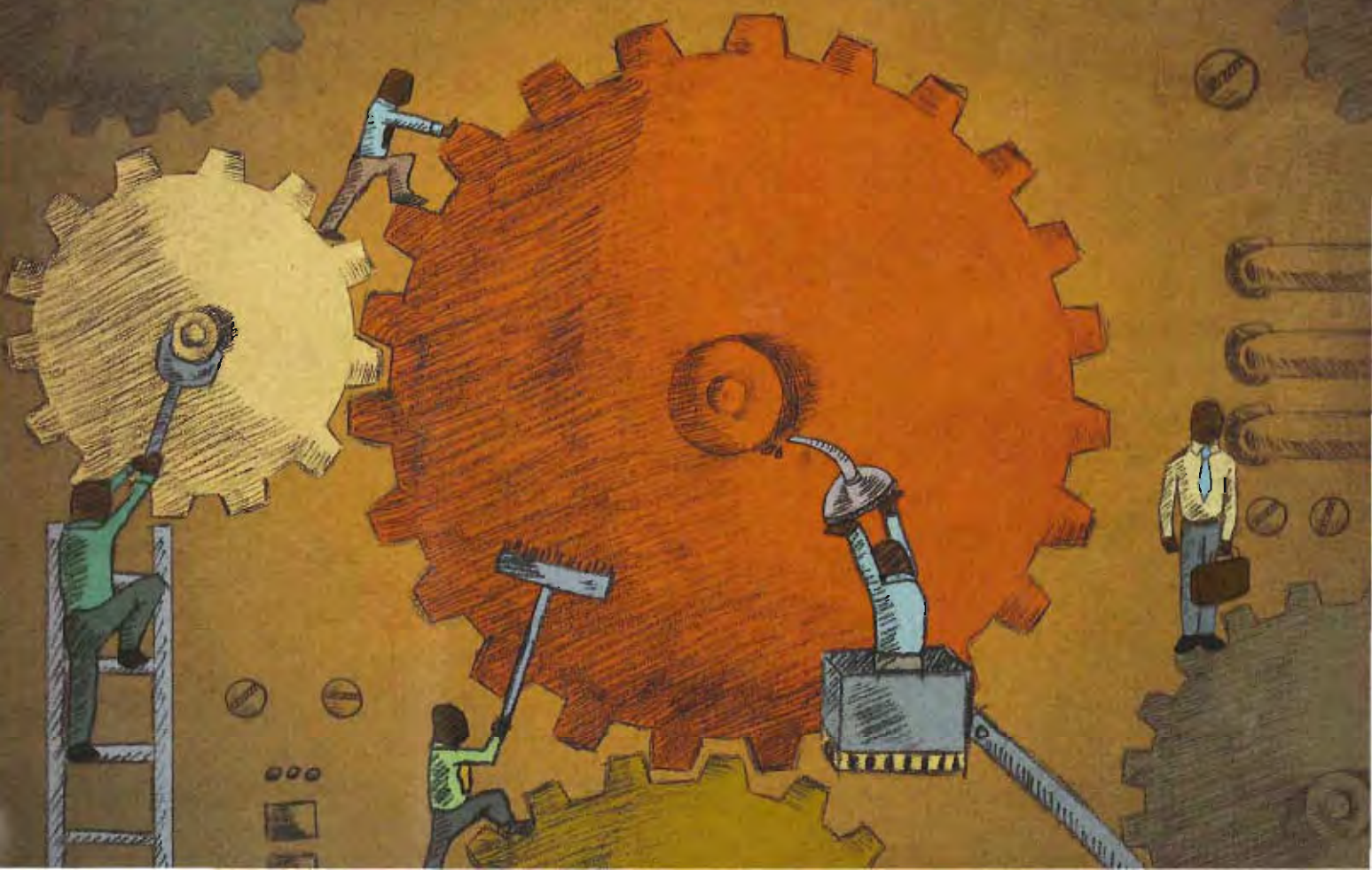
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The 6 Worst Things  
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Helping Clients with  
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Perfect Storm

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## The PEO Sales Engine How to Keep it Running Smoothly



## The Perfect Storm—Revisited

Donald Mallo, Esq.



In 1991, a natural event occurred that had been rarely seen. Off the coast of the North Atlantic, nature was about to unleash a force unlike anything in recorded history: the collision of three powerful storms, creating an unprecedented destructive force crushing anything in its path.

Twenty years later, small business owners across the country are facing their own version of the “perfect storm,” a dysfunctional and unpredictable economy, a myriad of new and often contradictory regulations, and government efforts to redefine and strictly enforce existing laws. This new economic reality has invited confusion within the small business community and even may be hindering recovery. Now, more than ever, small businesses are seeking ways to weather the storm and are turning to PEOs to provide financial security and “safe harbor” to minimize the economic effects of these forces.

### The Forces at Work

There has been a significant increase in the amount of employment-related litigation compared to general litigation. In fact, approximately 25 times more employment discrimination cases were filed in 2010 than in 1970, with a substantial number of these cases involving costly class action suits. These cases encompass virtually all employment-related areas, ranging from wage and hour matters, to unlawful employment practices, to so-called whistle-blower litigation.

### Increase in Wage and Hour Claims

Over the past 10 years, the number of cases alleging wage and hour violations has been increasing at an alarming

rate. In no small part, this increase can be attributed to the current economic downturn and the government’s attempt to generate additional revenues by strictly enforcing existing regulations, including allegations of unpaid overtime, denied meal and rest breaks, employee misclassification, unpaid termination wages, and vacation benefits.

Many of these wage and hour cases have settled, some for substantial amounts. Therein lies the rub. Although expensive, the cost of settling a case may be less expensive than expending limited resources to mount a vigorous defense. Bad settlements make bad law and embolden governmental agencies and private litigants to take more aggressive action, thereby perpetuating the employment litigation lifecycle.

Compliance with the provisions of the Fair Labor Standards Act (FLSA) and its state counterparts is one of the most common challenges affecting the small business owner. This depression-era statute is not user-friendly and its provisions have not kept pace with today’s 24/seven, instant-messaging, and social-media-based world:

- A New Jersey federal court unanimously awarded \$2.5 million dollars to employees of Staples, Inc. in a class-action lawsuit for the company’s failure to properly classify employees as non-exempt and denying them overtime wages.
- Former employees of Valero Energy Corp. sought to recover more than \$100 million in damages by alleging that the company required employees to work off-the-clock overtime without compensation.

- A Texas staffing company providing workers for major hotels in the Dallas-Fort Worth area has agreed to pay more than \$242,000 to employees after a U.S. Department of Labor (DOL) investigation uncovered FLSA violations for non-payment of overtime, failure to maintain adequate payroll records, and misclassifying workers as independent contractors instead of W-2 employees.
- Two Florida restaurants will pay \$934,425 in back pay and other monetary damages to 30 employees after the DOL found the restaurants to have engaged in employee misclassification and violated the overtime compensation and record-keeping requirements of the FLSA. Investigators found that kitchen employees were improperly classified exempt from FLSA overtime pay provisions and did not receive proper overtime pay. The employees will receive \$584,425 in back wages and an additional \$350,000 in liquidated damages in 13 monthly installments.
- The Los Angeles-based Japanese restaurant group Bishamon Group Restaurants agreed to pay 66 employees \$144,721 in back wages for violating provisions of the FLSA.
- The DOL initiated a program called “We Can Help.” This initiative encourages workers to seek assistance from the Department of Labor if they believe they are not being properly paid or are misclassified.
- The DOL announced its intent to focus on correcting worker-classification issues in 2011 and added 90 new enforcement personnel and an additional \$12 million to the Wage and

Hour Division's budget to address this issue. In an era of budget cuts, you can be sure that the DOL will be seeking a substantial ROI on this investment in personnel.

### What Employers are Doing to Overcome the Storm

Unlike the natural weather conditions that created nature's perfect storm, small businesses are doing more than simply talking about the weather. They are seeking ways to reduce costs, limit exposure, implement best practices, and prepare themselves for the eventual economic recovery. Here are some key to-dos that I recommend employers consider to avoid and/or minimize the risk of employment-related litigation:

- Audit internal wage and hour practices to ensure employees are properly classified and all non-exempt employees are paid for time worked, including overtime.
- Evaluate relationships with independent contractors and determine whether these individuals are properly classi-

fied or should be hired as employees. Both federal and state departments of labor, as well as the Internal Revenue Service and local counterparts, continue to scrutinize this area and have implemented specialized task forces to monitor compliance. These enforcement measures have generated substantial revenues for depleted public treasuries.

- Review company policy regarding the benefits of developing and implementing an arbitration solution for employment-related disputes, including execution of class action waivers consistent with the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, 563 U.S. \_\_\_\_ (April 27, 2011), and apply this decision to wage and hour issues.
- Establish policies regarding the use of social media both inside and outside the workplace. Employees need to be aware that posting offensive, derogatory, or confidential information on personal pages is unacceptable behavior.
- Audit disability leave policies to ensure

they do not contain inflexible provisions providing for automatic termination after an employee has been out for a certain period of time. The Equal Employment Opportunity Commission (EEOC) has recently been challenging those types of policies, taking the position that inflexible leave policies violate the Americans with Disabilities Act (ADA) because they do not contemplate engaging in the interactive process to determine if additional leave or some other reasonable accommodation might be warranted. This is particularly relevant with respect to the 12-week job preservation requirements within the Family and Medical Leave Act (FMLA). Accommodations may be required for additional time.

- Document all employment performance issues and adhere to progressive discipline procedures.

### Conclusion

The message is clear. Today's small business employer has neither the time nor the expertise to focus on the myriad of employment-related issues confronting him and needs to concentrate on building the business. That said, the employment-related risks discussed above cannot be ignored or minimized. However, with assistance from a PEO, the small employer can identify, prevent, and correct issues before they escalate into expensive litigation and potentially significant settlements. This is the unique value proposition PEOs offer their clients in an uncertain and ever-changing environment. ◊

*Donald Mallo, Esq. is vice president, human resources, and general counsel for Extensis Group Holdings, Woodbridge, New Jersey.*



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10150 Highland Manor Drive  
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### further reading

An in-depth discussion of client regulatory compliance is available to NAPEO members at [www.napeo.org/members/insider/nov10feature.cfm](http://www.napeo.org/members/insider/nov10feature.cfm).

