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Labor & Employment Update

Overtime Claim Explosion Counsels Caution in Wage & Hour Practices

By Nicholas Anaclerio and Kamau A. Coar

Evil intent *is not* a prerequisite to being sued by current or former employees. Many companies continue to find this out the hard way as more and more employees have brought “wage and hour” claims alleging violations of the mandatory overtime provisions of the federal *Fair Labor Standards Act (FLSA)*¹ and its state-law counterparts.

The *FLSA* entitles employees to overtime pay of not less than 1.5 times their regular hourly rate for all hours worked over forty hours in a given workweek unless they are specifically exempted by the law and the complex regulations that implement it.² Most *FLSA* wage and hour claims stem from allegations that an employer failed to pay mandatory overtime wages. Many suits allege that the defendant employer incorrectly classified plaintiff employees and those similarly-situated to them as exempt from overtime. Some suits claim that employers mistakenly failed to accurately track or document employee’s hours. And while other suits are based on claims that an employer intentionally forced employees to work overtime “off the clock” or deliberately retaliated against employees for exercising rights protected by the law (such as complaining about an employer’s overtime practices), many suits are prompted by honest errors. So while deliberate wrong-doing can definitely expose employers to liability under the wage and hours laws, it is certainly not required. Accounting or payroll processing errors, ignorance of the often complicated and nuanced exemptions to the *FLSA*, following bad advice or simple negligence can cost a company hundreds of thousands of dollars in unpaid back overtime wages, liquidated (punitive) damages in an amount equal to the unpaid overtime and the attorneys’ fees of both the employer’s defense counsel and the lawyers for its employees.

The number of new *FLSA* lawsuits has skyrocketed in recent years, from just 663 in 2002, to 1,864 in 2006. The past several years have seen a rapid upswing in employees’ class or “collective” actions, which can be lucrative propositions

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for the attorneys who prosecute them. In 2002 and 2003, there were, respectively, only 663 and 1,071 wage-and-hour lawsuit filings in federal and state trial courts. Since the U.S. Department of Labor (DOL) revised the regulations governing the *FLSA*'s executive, administrative and professional employee exemption in 2004, however, the number of wage-and-hour lawsuit filings has multiplied: through the first six months of 2005 alone, approximately 2000 private *FLSA* suits were filed.³ In 2006, over 26,000 *FLSA* complaints were made to the DOL, resulting in more than \$171.5 million in back wages collected on behalf of nearly 250,000 employees.⁴ In the last year, many wage and hour disputes have resulted in large settlements and judgments. For example:

- + Wal-Mart agreed to pay \$33 million in back wages and interest to 86,680 workers.⁵
- + A large, nationwide jewelry retailer agreed to pay \$1.29 million in back wages to 16,820 employees.⁶
- + A chain of gas stations and convenience stores agreed to pay 767 employees a total of \$900,000 in back wages, plus a \$100,000 penalty to the federal government.⁷
- + Two subcontractors paid over \$900,000 in back wages to 382 current and former security guards and debris removal workers.⁸
- + A home cleaning company was ordered to pay \$3,467,789 in back wages, plus \$1,058,973 in liquidated damages, to 385 current and former low-wage domestic workers.⁹
- + Farmers Insurance Exchange paid approximately \$52 million after it incorrectly assessed overtime for its insurance adjusters.¹⁰

The lesson is clear: many employers can benefit from a thoughtful and well-counseled audit of their overtime practices that includes a review of their record-keeping and their classifications of worker as exempt or non-exempt from *FLSA*-mandated overtime wages. Even innocent mistakes can present costly liability exposure if allowed to go undetected and uncorrected, particularly since the *FLSA* includes 2 and 3-year statutes of limitations for, respectively, non-willful and willful violations of the law. Proactive management in the wage and hours arena can

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help employers identify areas of non-compliance and give them peace of mind that on-going wage and hours practices are in compliance with the law.

Ungaretti & Harris LLP assists employers in identifying and correcting wage and hour compliance problems. We have extensive experience in defending employers against both individual and collective actions alleging violations of the overtime laws. Please contact us for further information.

¹ 29 U.S.C. § 201 *et seq.* (2006) (“Fair Labor Standards Act of 1938”).

² 29 U.S.C. § 207(a)(1) (2006).

³ *Looming Liabilities*, Steven T. Catlett and Michael J. Gray, Human Resource Executive Online, November 17, 2005

⁴ *2006 Statistics Fact Sheet*, US Department of Labor, Employment Standards Administration Wage and Hour Division.

⁵ *Wal-Mart Workers to Receive More Than \$33 Million in Back Wages*, U.S. Fed. News, Jan. 1, 2007.

⁶ *Sterling Jewelers Agrees to Pay \$1.29 Million in Back Wages to 16,820 Workers in 41 States*, U.S. Fed. News, June 13, 2006.

⁷ *Gas Station/Convenience Store Chain Agrees to Pay \$1 Million to Settle U.S. Labor Department Lawsuit*, U.S. Department of Labor News Release, Apr. 2, 2007.

⁸ *U.S. Labor Department Recovers Nearly \$1 Million in Back Wages For Hurricane Katrina Workers*, U.S. Department of Labor News Release, Sept. 19, 2007.

⁹ *Court Orders Southern California Home Cleaning Business to Pay More Than \$4.5 Million in Back Wages and Liquidated Damages*, U.S. Department of Labor News Release, Aug. 30, 2007.

¹⁰ *Pain-and-a-Half*, CFO Mag., Oct. 1, 2006, at 9.

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Ungaretti & Harris' Labor & Employment Team provides a full range of labor and employment counseling and litigation services to diverse employers facing an ever-expanding body of federal, state, and local laws affecting their businesses. Our employment claims avoidance services include drafting employment policies, procedures and agreements including arbitration and venue selection mandates, counseling employers on effectively conducting internal investigations, negotiating sensitive terminations and implementing protective separation agreements. We consistently win pretrial dismissals and summary judgments to avoid altogether the risk, business disruption and expense of trial, and we have the jury trial experience to effectively try the most difficult cases where necessary. We provide responsive, insightful and practical advice, and aggressive, winning advocacy.

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