

SPECIAL ISSUE

brief



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How to Avoid
A Major Litigation Headache
Under the Fair Labor Standards Act

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KEY QUESTIONS EVERY EMPLOYER NEEDS TO ASK

What do you pay each of your employees to do? The answer is simple, straightforward and easily stated for most of us. We pay our employees to efficiently and effectively perform their jobs, to maintain and improve the quality of life and lifestyle for our residents, and to otherwise represent us and our interests in the workplace in a positive and productive light. That's what you pay your employees to do, right?

But, what if the question is not about generally what you expect, but about specifically what each employee does on a day-to-day basis? What if the question focuses on whether you have a job description for each employee, whether each job description is a fully accurate list of the employee's duties and responsibilities and/or whether the employee really supervises others and has authority involving the exercise of "independent judgment?" In other words, what if the question focuses on whether you have accurately classified each employee as "exempt" or "non-exempt" from receiving overtime?

Alternatively, what if the question focuses on how much time each employee spends at work each day and each week? What if you have to produce an accounting not just of the regular full time hours that are expected of employees, but of the exact number of minutes each employee works on a weekly basis? What if this number must account not only for clock-in and clock-out times at the beginning and end of each workday, but also for any breaks each employee takes. And also for "on call" time? And also for some time spent preparing for work? And what if this number also must account for time you allow certain employees to spend working remotely from home or "on the road?" In other words, what if the question focuses on whether you have paid each employee all of the overtime he or she may be entitled to for the last two or even three years?

These are some of the questions employers find themselves having to answer, under a microscope, when they become the next victims of a nationwide surge in legal actions under the federal Fair Labor Standards Act ("FLSA") and related state laws. In some ways, it is remarkable that claims under the FLSA, which was enacted in 1938 and is among the oldest of the laws governing the workplace, should be so prevalent 70 years later in 2008. However, a veritable wave of FLSA actions has swept the country over the past few years, with no sign of abating. This article will focus on what drives these lawsuits and how you, as an employer, can avoid becoming a victim of one.

WHAT DRIVES FLSA LITIGATION?

In some respects, the age of the FLSA contributes to the resurgence of actions under it. Today's workplace and workforce is very different from those in 1938, yet the FLSA has not changed much with the times. In recognition of this, in 2003 and 2004, the United States Department of Labor ("DOL") undertook to revise the FLSA regulations, including the tests for determining who is "exempt" and who is "non-exempt" from the coverage of the FLSA. If anything, however, the DOL's recent focus on the FLSA has served to stir up rather than quell FLSA litigation. Why?

» Availability of Collective Actions

A significant driving force of FLSA litigation over the past few years is the availability of collective actions. A collective action is the same as a class action, except that potential class members are presented with a choice to "opt in" to rather than "opt out" of the lawsuit. As a practical matter, the availability of collective actions means that any disgruntled current or former employee who goes to a plaintiff's lawyer about the possibility of suing his/her employer for a wage and hour violation may become the representative of an entire collective of current and former employees. Any employee with a claim for overtime wages may, if his claim arises from a practice applicable to others in the workforce, drive a lawsuit worth many multiples of his own, often modest claim. This makes these FLSA cases much more attractive to the plaintiff's bar than the average discrimination or harassment case involving a single plaintiff.

Moreover, the possibility of a collective action usually gets first attention in the litigation. Most courts allow FLSA plaintiffs to first conduct discovery on whether they may represent a collective action before the merits of their own cases are even explored. Because the FLSA and most state wage and hour laws provide for the recovery of attorneys' fees for successful plaintiffs, employers facing potential collective actions are often trapped in a fight which becomes more costly to defend and more difficult to settle as time goes on. Very often, plaintiff's lawyers are not even open to settlement discussions until the collective action question is decided. By that time, regardless of the decision, the fees have already driven any possible settlement figure sky high. These cases therefore often quickly become troublesome "all or nothing" litigation which cannot be won without significant expenditure of attorneys' fees to the employer's own counsel, and which cannot be settled without paying a significant premium to the plaintiff's attorney to cover his or her fees. And if there is a basis for liability, look out!

» Confusion and Neglect

Of course, despite the availability of collective actions, plaintiff's lawyers would not be flocking to the courts with FLSA cases if nobody was actually violating the FLSA. The structure of the FLSA and the way the courts administer FLSA lawsuits make them particularly attractive and frequently lucrative for the plaintiff's bar, but they still get nothing if they lose. The problem is that, whether because of confusion or neglect or both, corporate America has long been engaging in practices which allow plaintiffs to often win FLSA cases.

The confusion leading to FLSA liability generally comes from employers' failure to properly classify their employees as "exempt" or "non-exempt." Despite the DOL's attempts to simplify the tests for determining "exempt" or "non-exempt" status, it is still easy to make mistakes. Among others, definitions of what constitutes supervisory authority and/or what type of judgment is sufficiently independent to render an employee exempt remain fuzzy, especially when specifically applied to poorly drafted job descriptions which may or may not fully or accurately describe what employees do. Many employers also remain confused about the affect of paying employees on a salaried versus on an hourly basis – assuming, incorrectly, that salaried employees are always exempt and/or not realizing that paying an otherwise exempt employee on an hourly basis generally destroys the exemption. Each of these many sources of frequent confusion may result in misclassification, with potentially devastating consequences.

The neglect leading to FLSA liability generally comes from employers' failure to set up accurate and effective systems for recording the hours worked by their "non-exempt" employees. The DOL places the onus on the employer to establish systems to track non-exempt employees' hours and to keep records showing all hours worked and wage payments corresponding to these hours. Where an employee claims not to have been properly paid and the employer does not have adequate time-keeping systems and/or does not maintain accurate records, DOL takes the employee's word for how many hours the employee worked. Although it would seem a straightforward thing to keep accurate records of hours worked and pay on the basis of them, many employers simply fail to set up and/or consistently administer full-proof time-tracking systems. These failures have proven very costly.

» **Challenges of the New Economy**

When the FLSA was first enacted in 1938, and for many years thereafter, the economy was dominated by manufacturing and other "blue collar" occupations. These occupations lent themselves to old-fashioned punch-in/punch-out time clock systems where a worker could not enter or leave the factory floor without clocking into or out of the time-keeping system. Hours of traditional "non-exempt" workers were easily tracked under these conditions. By contrast, today's economy is dominated by service industries, such as assisted living, where the industrial time clock is often regarded as primitive or counter-cultural. More frequently, employers count on employees to sign in or out or to log into a computerized time system. Even where the old industrial time clock is still used, time punches are more difficult to monitor and control because the average workplace is no longer set up so that physical access can be restricted to those who have punched in or out. Many more opportunities therefore now exist, every single day, for difficult-to-monitor time sheet discrepancies to arise.

In addition, the economy of the 21st century involves much greater workforce mobility than ever before. Cell phones, laptops, personal digital assistants and other electronic devices allow for telecommuting arrangements that were unheard of even a few years ago. Despite the difficulties many employers face in simply maintaining accurate timekeeping systems for their facility-based workforces, non-exempt telecommuters present even greater challenges. And the

problems are not limited to “work from home” telecommuters. How does one keep accurate time records for non-exempt sales and marketing personnel who do a lot of work away from the facility and/or in the community? How does one track the hours of non-exempt administrative and executive assistants who take work home and/or are expected to be available by cell phone to help exempt employees who may be working or traveling and require assistance outside the usual “9 to 5” context? These challenges have all contributed to the surge in FLSA lawsuits.

HOW TO AVOID BECOMING THE NEXT FLSA DEFENDANT

As with all litigation risks, a little forethought and preventive maintenance can go a long way toward avoiding a nightmare scenario. There is no way to absolutely prevent lawsuits, but as with any employment litigation where plaintiff’s attorneys invest with their clients in contingency arrangements, the best way for employers to avoid lawsuits is to make sure they do not present attractive targets. What follows are some relatively simple steps which can significantly diminish the chances of FLSA litigation.

» **Ensure Proper Classification**

As noted above, one of the most significant pitfalls for employers is the misclassification of non-exempt employees as exempt. Although the DOL attempted to refine and streamline the various tests for determining exempt or non-exempt status, there remains significant confusion. Nevertheless, given the potential consequences of misclassification, it behooves all employers to do some self-analysis. And one little known and underutilized fact about the FLSA is that even where employers get it wrong, they may claim certain “good faith” defenses to liability where they relied upon the opinion letter of counsel in making classification determinations. There is also a procedure for employers to anonymously submit their FLSA classification issues to the DOL itself. Although there is no guarantee that DOL will render such an opinion for any given employer, and there is no way to control its timing, employers enjoy even greater, sometimes full proof “good faith” defenses to FLSA liability where their classification decisions are based on DOL opinions. Employers may therefore consider submitting their FLSA classification questions to their labor counsel or, in the case of the more difficult, potentially precedent-setting classification decisions, to the DOL, for an opinion.

» **Establish Sound and Effective Systems for Recordkeeping**

A full-proof record-keeping system is the other best preventive measure to avoid FLSA liability. Creating a full-proof record-keeping system takes time and effort to analyze, design and administer. However, the cost of defending just one messy FLSA lawsuit will generally far outpace the cost of examining, troubleshooting and adopting effective record-keeping systems. Exactly what those record-keeping systems should look like depends on the nature of the employer’s operations. As noted, old fashioned time punch systems remain sound and may still

be used effectively in many facilities. More frequently, however, computer based log-in/log-off systems are the more modern and progressive choice – and are best able to keep up with changing technologies applicable to increasingly mobile workforces. Whatever system is used, however, it should be designed and tested with one question in mind: if employee X claims that he or she worked and was not paid for overtime on date Y, can we clearly document otherwise? If the answer is a confident “yes” in all cases, the chances of having to defend an FLSA collective action diminishes considerably.

» **Establish an Effective “Safe Harbor” Policy**

As a final note, the 2004 DOL regulations included a new and important “safe harbor” provision creating a defense to liability for any employer that provides for administrative pay corrections. This is a written handbook provision or policy prohibiting improper deductions, setting up an effective procedure for employees to report if improper deductions are made from any paycheck and requiring payroll adjustments to be made if there was, in fact, a mistake. Remarkably, despite the clear benefit of this new “safe harbor,” and the relative simplicity of taking advantage of it, many employers still have not done so. In fact, many employers have not even been aware either of the availability of this “safe harbor” defense or the potential consequences of not having one. Once aware, however, every sensible employer should have an “administrative pay corrections” policy.

CONCLUSION

The explosion of FLSA litigation over the last few years presents serious risk for the unprepared or unwary employer. As with most types of litigation risk, however, the risk of FLSA litigation can be readily managed with just a small bit of cost, effort and forethought. Employers may significantly minimize their chances of being targeted for FLSA litigation by taking a few basic proactive steps. The preventative measures outlined in this article are simple and straightforward. Like most business decisions, being proactive is always a matter of priority. Many employers end up targets of costly FLSA litigation merely because they were too busy reacting to crises to be proactive about wage and hour issues. Then, of course, the wage and hour issues themselves become the crisis. Unfortunately, there is no way to absolutely prevent lawsuits. However, employers willing to invest in an ounce of prevention on their FLSA classification and timekeeping practices and procedures are likely to save many many pounds of extortionate litigation cost down the road.



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Jon Zimring practices management-side labor and employment law, with a focus on health care. He splits his practice between client counseling and training of client workforces, representing employers in employment and traditional labor litigation and representing employers and owners in their dealings and/or negotiations with labor unions.

Mr. Zimring counsels health care clients on issues that run the gamut from troubleshooting the termination of difficult or dangerous employees to investigating and counseling through remediation of harassment and discrimination complaints to overhauling entire human resources systems and training large and small workforces on litigation avoidance.

Mr. Zimring has also represented numerous companies as well as public entities in traditional labor matters. He has provided guidance and counsel to health care employers who have first become targets of union organizing efforts as well as to those who are already in mature relationships with unions.

Mr. Zimring has handled numerous counter-organizing campaigns, collective bargaining negotiations, grievance arbitrations and both representation cases and unfair labor practice charges before the NLRB.

A member of the American and Chicago bar associations and the Society for Human Resources Management, Mr. Zimring is a 1992 graduate of Northwestern University School of Law and a graduate of the University of Michigan. In 2006, Mr. Zimring was honored by being named among the top "Forty Under 40" attorneys to watch by the Chicago Daily Law Bulletin.

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