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The Rise in **Wage** and **Hour** Suits: What's at Stake

Don't underestimate the power of collective actions claiming overtime.

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YOUR CLIENT informs you that it has just been served with a federal complaint seeking unpaid overtime for several former employees and all those "similarly situated." Your first reaction may be to dismiss from consideration Wal-Mart's $33.5 million settlement in 2007 for unpaid overtime because your client simply is not that large a company.[1]

However, while your client may not be the size of Wal-Mart, you would nevertheless be prudent to consider that since Jan. 1, 2006, there have been more than 850 cases filed in New York federal courts alleging violation of some provision of the Fair Labor Standards Act (FLSA) against companies of all sizes and in a variety of industries. As explained below, because the applicable statutes permit employees to join together in these actions, these suits have the potential to result in judgments of hundreds of thousands of dollars in unpaid wages, penalties and attorney's fees.

In addition, not only do private plaintiffs commence FLSA actions, but the U.S. Department of Labor (DOL) also investigates and prosecutes its own actions. Indeed, in fiscal year 2007, the DOL recovered more than $220 million in back wages on behalf of 341,624 workers.[2] According to the DOL, last year's recovery was the highest in its history. Significantly, both the Wal-Mart and the DOL recoveries averaged only approximately $300 to $600 per employee. However, because they were prosecuted collectively, the numbers grew exponentially. And therein lies the concern for employers.

The Statutory Framework

In New York, both state and federal laws apply to the payment of wages.[3] New York state's laws provide coverage that is equal to or greater than the FLSA. As discussed below, there are three aspects of pursuing claims under New York law that differ significantly from claims pursued under the FLSA: the standard governing employees' ability to join together to prosecute their claims; the statute of limitations; and the penalties for willful violations.

The greatest risk for employers stems from the fact that employees' claims for unpaid wages and overtime can be prosecuted as collective actions under the FLSA.[4] The significant characteristic of the collective action procedure is that it is more easily satisfied than the traditional class action. Plaintiffs need only establish that they are "similarly situated." Federal courts routinely have found that this standard requires a "minimal showing."[5] Further, courts have rejected defendants' efforts to distinguish among the potential plaintiffs by claiming differences among them with respect to their abilities and competence.[6] Indeed, such attempts to avoid certification of collective actions have routinely failed.

Should a collective action be certified, each plaintiff who wishes to participate must "opt in." Thus, no employee can participate unless he or she gives consent in writing to become a party and such consent is filed in the court in which the collective action is brought.[7]

The collective action applies only to claims asserted under the FLSA. It is precisely because of the opt-in nature of the collective action and counsel's obligation to get each plaintiff to sign a consent that plaintiffs seek also to assert claims under state law through a traditional class action. Although the standards to certify a class action are more difficult to meet than those for a collective action, a class action is "opt-out" and, therefore, counsel does not need to name the individual plaintiffs. Thus, the class generally is substantially larger than it might be if the claims were brought only as a collective action.

Another reason why plaintiffs combine state and federal laws is to maximize

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the applicable penalties and statutes of limitations. Under the FLSA, the limitations period is three years for willful violations (two years for non-willful violations).[8] However, under New York law, claims can be asserted for up to six years.[9] Under the FLSA, willful violations entitle plaintiffs to liquidated damages of double the amount of back wages awarded.[10] Under New York law, a finding of willful conduct entitles plaintiffs to a 25 percent premium.[11] Thus, in the typical case, claims are asserted going back six years. If a willful finding is made, plaintiffs can recover double damages for three years (as permitted by the FLSA) and a 25 percent premium for the remaining three years (as permitted by New York law). Finally, in addition to any judgment awarded, plaintiffs can recover their attorney's fees. Because plaintiffs can take advantage of whichever law provides the greater benefit, employers likely will find themselves defending a wage and hour lawsuit that combines both FLSA and state law claims.

In addition, not only are corporate entities exposed to liability, but individuals can be held liable as well. Indeed, the FLSA defines an employer to include "any person acting directly or indirectly in the interest of an employer in relation to an employee…"[12]

Combining the potential back wages award for a class of employees plus the penalties and attorney's fees, it becomes clear why wage and hour actions are aggressively pursued. Below we highlight some of the more common pitfalls that expose employers to liability.

Misclassification as Exempt

One mistake frequently made by employers is misclassifying non-exempt workers as exempt. Many employers are familiar with the most common exemptions—the "white collar" exemptions for executive, administrative, and professional employees, computer professionals, and outside salespeople—and believe that they know how to apply those exemptions.[13] Briefly, in order to be exempt from receiving overtime, an employee must perform the duties that define the exemption and be paid on a salary basis at least $455 per week. Notably, the fact that an employee is paid a salary is alone not determinative as to whether an exemption applies. Similarly, the employee's job title is not controlling. Thus, the fact that an employee is called a "manager" and earns in excess of $455 per week is not sufficient. One must look beyond the job title to the actual job duties to determine whether an exemption applies.[14]

It is important for employers to understand that the law narrowly construes exemptions against the employer asserting them. Accordingly, it is essential that before an employer applies an exemption to certain employees, it closely examine the terms and conditions of the claimed exemption in light of the employee's actual duties. Ultimately, the employer must bear the burden of supporting the actual application of an exemption to its employee.

Although it is unclear exactly what has spurred the recent increase in Fair Labor Standards Act cases, employers must confront the reality that the number of lawsuits is increasing and this trend shows no signs of slowing.

One common predicament encountered by employers when employees are erroneously treated as exempt is the lack of required time-keeping records. Federal regulations mandate that employers maintain accurate records for their non-exempt employees. While the FLSA does not obligate employers to keep records in any particular form, it does require that the records include certain accurate identifying information about the employee and data about the hours worked and the wages earned. Records must contain, among other things, the employee's full name and social security number, address, gender, occupation, time and day of the week when the employee's workweek begins, hours worked each day and each workweek, regular rate of pay, and the basis on which the employee's wages are paid (e.g., per hour, week or by piece).

The records must also delineate the total wages for each pay period (including the date of payment and the pay period covered by the payment), the total daily or weekly straight time and overtime earnings, as well as any additions to or deductions from the employee's wages.[15] Thus, the employer who misapplies the exemption to a covered employee, thereby failing to keep required records, will be violating federal regulations.

More significant, without the required time records, an employer will be unable to establish how much time (including overtime) each employee worked. In this regard, the Southern District of New York ruled in March 2008 that in the absence of accurate time records, an employee's account of the time worked would be given credence.[16] Indeed, the court stated that the plaintiff's evidence may be based "solely on his or her recollection."[17] Further, the court stated that "'while the testimonial evidence may be imprecise, [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA].'"[18]

Thus, the importance of properly classifying employees so that the employer has accurate time and payment records is critical. Misclassification, even if not done intentionally, can have dire economic consequences for employers.

Other Common Traps

Off-the-Clock Work. In addition to misclassifying employees, there are several other "hot button" issues that often arise in the context of wage and hour lawsuits. One very common problem involves work that is performed "off the clock." The U.S. Supreme Court has determined that employees must be compensated for all activities that are "an integral and indispensable part of the principal activities" of the individual's job.[19] Therefore, the putting on and taking off of specialized clothing "before or after the regular work shift, on or off the production line" is compensable time for which an employee should not be "off the clock."[20]

In *IBP v. Alvarez* and *Tum v. Barber Foods*,[21] the Supreme Court considered the compensability of the time associated with required clothing changes. The Court held that the time spent by employees walking between required protective gear changing areas and the production line

was compensable work time under the FLSA. Further, the Court found that time spent by employees waiting to remove that gear at the end of the workday also was compensable.[22]

Conversely, an employee who arrives early to get coffee does not need to be compensated for that time, as this activity is likely not "an integral and indispensable part" of the employee's job duties. However, many employees do clock in early and thus their time cards appear as if they are working. Should a suit be brought, an employer's defense that the employee was not working for the full time recorded will be compromised.

Other situations in which this issue arises include waiting for a computer to boot up and checking e-mail before starting work. If these activities are considered for the employee's convenience, they will not be compensable. However, if they are done for the employer's benefit, it likely will be considered time worked and thus compensable. While it may appear that these situations involve minimal time, this is precisely where the impact of collective actions hits home—as noted above, even liability of a few hundred dollars per employee can turn into millions of dollars of liability if the class is large enough.

Unauthorized Overtime/Working Through Lunch. Another widespread misunderstanding of this area of law involves employees who work overtime without authorization or who work through lunch. Many employers assume that where an employee works overtime without permission or chooses to work through lunch the company need not pay him. Both assumptions are incorrect. So long as an employee is performing work for the employer—even if done without authorization or during lunch—it is considered hours worked and must be compensated.

The 80-Hour Pay Period. Many employers also mistakenly calculate overtime based on 80 hours per pay period. However, overtime must be calculated based on 40 hours per week.[23] Thus, if an employee works 50 hours in Week 1 and 30 hours in Week 2, employers may erroneously not pay overtime. In this example, however, the correct method of calculating overtime would be to pay 10 hours of overtime in Week 1.

What Can Employers Do?

Although it is unclear exactly what has spurred the recent increase in FLSA cases, employers must confront the reality that the number of lawsuits is increasing and this trend shows no signs of slowing. The key for employers is to be aware of these perils and to take steps to address the issues before the lawsuit arrives.

Employers should pay particular attention to their classification of employees as exempt or non-exempt. It is recommended that counsel perform audits of employers' wage and hour compliance, including whether exempt employees properly are classified. Further, employers must be vigilant about keeping accurate time records, including adopting a reliable methodology for recording time. For example, companies should consider a timekeeping program that prohibits employees from signing in more than a few minutes early. In addition, employers should take into account how it will monitor employees who telecommute, or who use laptops and smart phones away from work. Failing to have systems in place to address these issues will enable employees to assert claims for overtime and leave the employer without a way to defend itself.

Additionally, policies should be established and enforced placing the duty on management to control the amount of work performed by employees. Management must ensure that employees are not working at times that the company does not wish work to be performed. It is well settled that it is not a defense to a claim for overtime that the employer did not require the employee to do the extra work. Indeed, an employer "cannot sit back and accept the benefits [of employees' work] without compensating for them" even if the work was not approved or requested by the company.[24]

It is also essential that managers be trained properly to enforce these policies and that discipline is imposed on employees who violate the company's overtime and related policies as well as the managers who permit such unauthorized work to take place. It is also recommended that employers review time cards at regular intervals to ensure that employees are complying with company time clock procedures (e.g., not clocking in early, clocking out for lunch, etc.).

In sum, an employer's recognition that "an ounce of prevention is worth a pound of cure" will go a long way toward minimizing the damages that are associated with the omnipresent wage and hour lawsuit.

1. "Wal-Mart Settles U.S. Suit About Overtime," The New York Times, Jan. 26, 2007.
2. http://www.dol.gov/opa/media/press/esa/ESA20071952.htm.
3. The federal FLSA applies to all businesses with an annual dollar volume of business of not less than $500,000 and with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. See 29 USC §201, et. seq. The New York State Labor Law has no such threshold.
4. State law claims can be asserted in federal court under the traditional class action mechanism. Fed.R.Civ.P.23.
5. *Chowdhury v. Duane Reade Inc.*, 2007 WL 2873929, at *1 (SDNY Oct. 2, 2007) (citing *Damassia v. Duane Reade Inc.*, 2006 WL 2853971, at *4 (SDNY Oct. 5, 2006)).
6. *Damassia*, 2006 WL 2853971, at *6 ("On defendant's logic, no group of opt-in plaintiffs would ever be 'similarly situated' unless they were clones of one another working in completely identical stores, in identical neighborhoods, with identical clientele").
7. 29 USC §216(b).
8. 29 USC §255.
9. N.Y. Labor Law §198(3).
10. 29 USC §216(b).
11. N.Y. Labor Law §198(1-a).
12. 29 USC §203(d). Under New York law, individual joint and several liability for wages due and owing extends to the 10 largest shareholders of a non-public company. N.Y. Bus. Corp. Law §630. Further, criminal penalties may be imposed upon officers and agents of any corporation that fails to pay wages. N.Y. Labor Law §198-a.
13. 29 USC §213(a).
14. A complete analysis of the exemptions is beyond the scope of this article. See generally, 29 CFR §541.1 et seq.
15. 29 CFR §516.2.
16. See *Park v. Seoul Broadcasting System Co.*, 2008 WL 619034 (SDNY March 6, 2008).
17. Id. at *7.
18. Id. (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 688 (1946)).
19. *Steiner v. Mitchell*, 350 US 247, 252-56 (1956).
20. Id. (holding that where employees must make extensive use of dangerous materials and are therefore compelled to change their clothes and shower to preserve their health, "time incident to changing clothes at the beginning of the shift and showering at the end" is compensable).
21. 546 U.S. 21 (2005).
22. See id. at 33-37.
23. 29 USC §207(a)(1).
24. 29 CFR §785.13.