

WAGE & HOUR LAWSUITS -- IS YOUR COMPANY AT RISK?

by Diane Geller

Since January 2005, an unusually large number of federal lawsuits have been filed claiming unpaid overtime and other violations of the Fair Labor Standards Act (FLSA). In fact, more than 1700 suits have been filed. Of those, 700 were filed in Florida and 500 were in South Florida.

This trend appears to be driven by the employment law plaintiff's Bar recognizing that many companies have not properly classified their employees (exempt vs. non-exempt) or have miscalculated overtime pay. The result has been a relatively easy source of income for these law firms since the FLSA provides that successful plaintiffs are entitled to recoup their unpaid wages and liquidated damages as well as their attorney fees. Therefore, the unsuccessful defendant runs a risk of paying not only its own attorneys but also those of the plaintiff. Oftentimes, an underpayment (A an insignificant amount of wages can result in the payment of legal fees that far exceed the amount the plaintiff may recover.

Further, savvy plaintiff attorneys are filing their claims for unpaid wages or overtime in the form of a class action (i.e. on behalf of the plaintiff and other similarly situated individuals) using the threat of obtaining class action certification as additional ammunition to cause the defendant company to seek a quick settlement of the action. Settlement is often being sought not because of the concern over the loss due to FLSA violations, but because of the distraction to its business caused by other current and former employees receiving an "invitation" to become a member of the class and join the suit against the employer.

Another consideration that should compel companies to review their FLSA and Florida wage and hour practices is the impact that a violation can have on a company's ability to enforce its non-competition agreements against former employees. Since the Florida "non-competition" statute (Florida Statutes §542.335) has been enforced to void the prior employee's obligations in the event there is a prior breach by the company, there is some concern that a breach of the FLSA or the Florida wage and hour requirements will void an otherwise enforceable covenant. The wage and hour statutes are written to make a breach non-waivable. Therefore, the fact that the employee quit without raising the issue or accepted the improper calculation of his wages is not enough to waive the fact that a violation exists. In fact, an employee signing a release of wage claims is oftentimes insufficient to release such claims. While we have not seen a court decision on this particular use of the violation of the wage and hour regulations, we have seen this defense recently used in a case to enforce a covenant, and the potential exposure remains.

It is critical that all employers review their wage and hour policies as the law applies to most employers regard-less of their size. The FLSA has a two-year statute of limitations applicable (three years if willful). We highly recommend that our client companies audit

their wage and hour policies and correct violations. It is especially important that the classification of employers as exempt vs. non-exempt (the employees right to be paid over-time) be carefully analyzed and action taken to correct any misclassifications promptly. The new statute that was effective last year has changed the tests for determining the proper classification of employees (exempt vs. non-exempt) and has made the determination somewhat easier to make.

Another important consideration that must be reviewed is recordkeeping. In the event the company fails to maintain proper records to support its payroll, the records of the employee together with oral testimony may be the basis on which a wage and hour case brought against your company is won or lost. Companies should also ensure that they are using the correct minimum wage (which changed recently under Florida law to \$6.15 per hour); confirm that the correct base wage is used for overtime calculations and be certain that anytime an hourly employee works (i.e., answers the phone while eating lunch or organizing their desk), they are compensated. In addition to properly treating non-exempt hourly employees, companies must make certain that they are not destroying the exemption of otherwise properly classified salaried exempt employees by making deductions that are not permitted by statute (which are very few). Improper deductions against an exempt employee's salary can unintentionally result in reclassification of the entire class of similar salaried personnel into hourly (non exempt employees).

Regular wage and hour compliance and good job descriptions must be part of the regular policies and procedures of the company. The Labor and employment law practitioners at Ruden McClosky are available to assist you with compliance or in the defense of enforcement action.