

## INCREASE IN WAGE AND HOUR CLASS ACTIONS

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We are seeing more and more FLSA collective actions and state wage class actions. Why? Compliance with federal and state wage and hour laws requires a complex legal analysis, often requiring employers and their employment lawyers to fit statutes, regulations and case law together like pieces of a jigsaw puzzle. This process can be time consuming and frustrating. Mistakes, to varying degrees, are common. The difficulties faced by employers in this area have not gone unnoticed by the plaintiffs' bar, as I am continuously reminded at seminars and in trade materials, as well as in my daily practice. This should not surprise us, considering both federal and Indiana wage and hour laws provide for awards of attorneys' fees to successful plaintiffs.

Employers who delay proper implementation and review of wage and hour practices do so at their own peril. What appear to be nominal damages with respect to a single employee can be financially devastating in collective or class actions (often the strategy of choice) once you factor in a two or three year time period, liquidated damages resulting in the doubling or tripling of awards to each employee, and attorneys' fees (which generally are significant in a wage case due to the need to review and handle years of employment records).

How bad can it be? Consider *Braun v. Wal-Mart*. In this recent case, two named plaintiffs brought a class action against Wal-Mart in Pennsylvania, claiming they were not paid for work "off the clock" or during rest periods. The jury awarded the class \$78 Million. The court awarded another \$62 Million in liquidated damages (in Indiana, liquidated damages could have been nearly \$156 Million) and \$45.6 Million in attorneys' fees. The total award including statutory interest was \$187.6 Million. To add insult to injury, it appears Wal-Mart's attorneys' fees and expenses for defending the case were approximately \$17 Million.

What would you do if faced with a judgment of nearly \$200 Million? Think insurance will cover it? Maybe not. Most of the insurance policies that I have reviewed over the years expressly exclude wage and hour claims from coverage. Think it's the employer's problem, not yours? Think again. The FLSA allows for personal (not just corporate), and criminal, liability. This means that, if you are responsible for a policy or practice that violates the FLSA, you may be held personally liable.

As you move forward, consider the following practical tips:

- As a general rule, you must satisfy both a salary basis and a duties test to take advantage of an FLSA exemption. Word choice on the job description may make a difference. Audit your job descriptions for accuracy and for word choice that supports any claimed exemption.
- FLSA exemptions are not necessarily intuitive. For example, the administrative exemption might not apply to an "administrative assistant" who does not have the required decision-making authority. Administrative and computer professional exemptions often create problems. Remember, the burden is on the employer to prove applicability of the exemption.

- Document efforts to educate yourself and your managers on the FLSA. Although there currently is no good faith exception to liability under Indiana's wage payment laws, you may reduce your exposure under the FLSA by demonstrating your effort to comply with the law.
- Confirm you are properly calculating the regular rate for purposes of calculating overtime. What are you doing with bonuses? How about shift premiums? Don't just trust your payroll system. Do spot audits at regular intervals.
- Are your non-exempt employees working "off the clock"? What about at home? How about dealing with work e-mails at home? Make sure you count all hours worked toward overtime.
- Establish policies and procedures to address, among others, an internal reporting and resolution process for employees who believe they have been underpaid (with a commitment to no retaliation), penalties for falsification of time records, working unauthorized overtime, working at home and/or "off the clock", and your commitment to state and federal wage and hour laws. If nothing else, good policies can reduce the risk of a manager making a costly mistake.
- Consider whether Indiana's "ten day rule" applies to your bonuses, commissions, and other forms of compensation. Remember, liquidated damages for late wage payments may be 10% per day (up to two times the amount paid late), plus attorneys' fees, and an employee can sue for liquidated damages even if you ultimately pay the original amount due.
- To get a waiver of FLSA claims, you need court or Department of Labor supervision. Careful drafting of separation agreements may provide some, although not complete, protection.

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