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Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take

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The weather analogy of the “perfect storm” is well-suited to describe the current situation confronting U.S. employers in the area of wage and hour law because of increased activity by plaintiffs’ bar; greater focus on wage and hour violations by the U.S. Department of Labor (DOL) in administering the Fair Labor Standards Act (FLSA);² leniency of rules governing the certification of FLSA collective actions; and, to some extent, employers lax in auditing wage and hour compliance. This paper reviews emerging trends in wage and hour litigation and suggests some precautions employers may take to address these trends and minimize their potential impact.

CLAIMANTS...AND THE LAWYERS WHO WANT TO REPRESENT THEM

There is unequivocally a rising tide (if not an oncoming tidal wave) of wage and hour litigation in the United States. From 2001 to 2006, federal court wage and hour class action filings doubled,³ and the pace has continued to accelerate. Our review of federal court data shows that of all state and federal class or collective actions filed in the United States, 90% are wage and hour claims. Further, the data also shows a 12% increase in wage and hour lawsuits (both single plaintiff and class/collective) filed in 2010 in federal courts, from 6,073 in FY 2009 to 6,825 in FY 2010. Within this segment, the vast majority of lawsuits filed are private lawsuits, not brought by a governmental agency. The potential damages in these cases is also alarming. In 2010, the average settlement in the top 10 reported wage and hour class and collective actions was \$34 million.

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Congress enacted the FLSA establishing the nation’s wage and hour laws in 1938.⁴ Although the FLSA was enacted to address issues surrounding manufacturing and factory-based jobs that formed the backbone of the American economy in the 1930s, it is now being applied to jobs that did not even exist in the 20th century. The change in the form of our economy, however, is not the sole reason for the staggering increase of FLSA lawsuits involving multiple claimants. Indeed, much of this increase comes from lawyers specializing in litigating cases with multiple claimants.

In recent years, plaintiffs’ firms have employed an industry-specific approach when it comes to wage and hour litigation.

Most often, one firm successfully targets an industry and is quickly followed by “me too” lawyers who seek plaintiffs to target other employers in that industry using “copycat” complaints. With today’s technology, potential plaintiffs can find legal representation without ever leaving their own homes. Plaintiffs’ attorneys are taking advantage of the Internet, social media and networking sites to reach potential plaintiffs. Oftentimes, websites allow plaintiffs to “submit a claim” from the comfort of their own couch. In addition, plaintiffs’ firms are hiring outside companies to send email blasts to employees of target companies.

The recent increase in wage and hour class and collective action litigation is, therefore, in no small part a function of the efforts of plaintiffs’ lawyers who are unlikely to curtail their efforts in light of the success they have experienced not only in soliciting and gathering claimants, but also in obtaining large attorneys’ fees in these cases. And in the unlikely event plaintiffs’ lawyers lose their motivation to bring more lawsuits, the DOL is either willing to step in their shoes or is actively involved in encouraging claimants to proceed with private lawsuits.

THE IMPACT OF THE ENFORCEMENT AGENCY – THE NEW DOL

Strengthened in their resolve by data suggesting in excess of 70% of employers are not in full compliance with the FLSA, Secretary of Labor Hilda Solis and the Obama administration have sent the DOL on a path of more vigorous enforcement of existing laws. In one of her first statements following her appointment in June 2009, Secretary Solis told attendees at the American Society of Safety Engineers conference, “Make no mistake, the DOL is back in the enforcement business.” A review of recent actions by the DOL and the Obama administration—from policy initiatives, to pronouncement on certain legal issues, to the promulgations of new regulations—make it clear that Secretary Solis is working to fulfill that goal.

Starting in 2009, the DOL promulgated a number of initiatives reflecting a harsher stance in its dealing with employers. These initiatives included the following intra-agency directives:

- More frequent imposition of liquidated damages for repeat or willful violations.
- A suggested prohibition on the use of the DOL's Release Form (known as a WH-58) in the absence of a "full investigation" conducted by the DOL, in contrast to its prior use to resolve a self-directed audit or a third-party (lawyer/consultant) evaluation.
- Targeting "misdesignated" independent contractors both by industry and job classifications.
- An effort to extend tolling agreements (agreements that preserve the period for which back pay can be claimed) to include the period in which individual employees can raise their claims, rather than limiting such agreement to an extension of the DOL's right to bring claims on behalf of employees.
- A suggestion that the DOL should no longer accept and allow Voluntary Compliance Arrangements, by which an employer could come to the DOL and admit to past non-compliance while entering into a promise to ensure complete future compliance.

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In 2010, the DOL began a policy and enforcement initiative targeting healthcare employers for failing to pay employees for missed or interrupted meal periods and failure to aggregate hours worked. The DOL also instructed its field operations personnel to direct audits at past recidivists, to be more aggressive in the use of civil money penalties for repeat and willful violations, and to use the three-year back-wage period for repeat and willful violations.

On April 1, 2010, the DOL launched a national public awareness campaign called "We Can Help." This public awareness effort is intended to provide workers with information about their rights in the workplace and to educate employees on how to seek the assistance of the Wage and Hour Division when they believe they have been the subject of a violation.

On April 26, 2010, the DOL announced its spring regulatory agenda and its emphasis on "Plan/Prevent/Protect: The Beginning of a Broader Regulatory and Enforcement Strategy." This strategic initiative is directed not just at the Wage and Hour Division, which administers the FLSA,

but also OSHA, MSHA, OFCCP. The new initiative requires employers to "find and fix" violations. "Employers and others in the Department's regulated communities must understand that the burden is on them to obey the law, not on the Labor Department to catch them violating the law. This is the heart of the Labor Department's new strategy." This new enforcement strategy will require employers to assemble plans, create processes, and designate people charged with achieving compliance.⁵

The DOL's first contemplated step for employer compliance ("Plan") involves the implementation of plans "for identifying and remedying risks of legal violations and other risks to workers." The second step ("Prevent") would require compliance with a proposed requirement that employers thoroughly and completely implement the plan in a manner that prevents legal violations. The final element of the DOL's strategic initiative is to "Protect." What the DOL seeks in this process is a specific timetable for monitoring ongoing compliance and will likely require periodic self-audits.

The DOL has indicated that the Wage and Hour Division is developing recordkeeping regulations that it plans to publish as a "Notice of Proposed Rulemaking" in 2011 as part of the DOL's Plan/Prevent/Protect strategy. According to the strategic plan, "the FLSA recordkeeping regulations under development will require that covered employers notify each of their workers of their rights under the FLSA, and provide employees with information regarding their hours worked and wage computations."⁶ This will likely have the most significant impact of the Plan/Prevent/Protect initiative by broadening the DOL's ability to monitor compliance with the FLSA. It is logical to expect, drawing a parallel with existing recordkeeping regulations, that the DOL will also impose sanctions for non-compliance. Although the regulations are not published yet, one could foresee that an employer that does not adhere to the new recordkeeping regulations may be subject to such sanctions even if the employer has not violated substantive provisions of the FLSA. In a time where the country's economic difficulties have left many employers with limited monetary resources, the DOL's new initiative is likely to create significant additional costs. Moreover, by setting a specific model of compliance, the DOL may have also defined the default expectations for employers. In other words, even though not fully implemented at this time, plaintiffs' attorneys may seek to use the Plan/Prevent/Protect initiative in employment litigation as a measure of employer compliance efforts.

On May 9, 2011, the DOL unveiled its latest effort to raise awareness of wage and hour issues for employees launching its first smartphone application, an electronic timesheet that employees are encouraged to use to track their hours of work, including breaks. According to the DOL, the information tracked through this application "could prove invaluable during a Wage and Hour Division

investigation when an employer has failed to maintain accurate employment records.” This application has the potential to be not only a source of support for litigation as the DOL suggests, but also a source of antagonism between employees and employers over such issues as rounding, pre-shift and post-shift activities and travel time, to name a few situations in which compensability itself may be an issue. The DOL also indicated that it expects to launch additional applications that will help employees track their tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest, among other pay information.

Data suggests in excess of 70% of employers are not in full compliance with the FLSA.

Thus, it appears that the DOL’s new strategy is not only to improve awareness of wage and hour laws for employers and employees, but also to actively support private litigation by creating employee expectations that may not always be accurate given the complexity of many wage and hour issues. The DOL’s new emphasis on compliance and enforcement strongly suggests that employers should actively assess wage and hour compliance and implement policies and recordkeeping software to address any issues.

RECENT TRENDS IN COLLECTIVE ACTION FOR UNPAID TIME

Two main claims in wage and hour litigation are unpaid work time and misclassification. The former claim involves assertions that the employer did not account for all of the time worked by an employee, and therefore the employee’s pay either dropped below minimum wage or overtime was not paid, or both. The latter focuses on whether employees are incorrectly considered exempt and therefore denied overtime premium compensation for hours worked over 40 in a work week. The nature of these claims are different, and this paper focuses exclusively on the trends arising in the area of unpaid work time claims and the practical steps employers can take to minimize their exposure to such claims.

There are five main subsets in which we found specific trends for unpaid work time litigation:

- (1) auto deductions for meal periods;
- (2) rounding;
- (3) remote work;
- (4) off-the-clock work; and
- (5) regular rate issues.

1. Auto Deductions for Meal Periods

We reviewed 23 published opinions in wage and hour class or collective action lawsuits arising during a period spanning from 2005 to 2010 involving challenges to meal period auto deduction policies. These cases involve claims that time for meal breaks was automatically deducted from employees’ pay even when an employee worked through all or part of the meal break period. Conditional certification was granted in whole or in part in 18 of these cases. Of course there are many more unpublished decisions in this area, but the fact that conditional certification was granted in a great majority of published decisions underscores the litigation risks and costs in these types of claims. As an example that further emphasizes the risks of such claims, UPS recently entered into an \$87 million class action settlement with 20,000 drivers who claimed UPS automatically deducted standard meal periods from wages.⁷ Of course, the size of the class and number of hours worked were factors in the size of this settlement, but the lesson remains valid for large and small employers alike.

Although automatic meal deductions are not per se unlawful, as long as employees either always take a meal break or record time worked during meal periods, the practice is fraught with monitoring difficulties that make it risky in the current litigation climate. Thus, employers may consider eliminating automatic meal period deductions and instead focus on enforcement of other policies, such as prohibiting employees from eating lunch at their workstations. On the other end, employers who have invested in an automated timekeeping solution may be able to implement specific policies to address the most common problems arising from auto-deduct policies, without sacrificing the labor cost benefits of such a policy.⁸

2. Rounding – A New Focus

Fundamentally, one must view the DOL’s rounding regulation in its proper context. Historically, when dozens of individuals waited in line to manually clock in and their time was accounted for manually by payroll clerks, allowing an “insubstantial or insignificant period” to be rounded off for accounting ease made sense. In an age where ultra-precise electronic time-recording software is widely available, the practical reasons behind the old DOL’s enforcement policy have almost completely eroded. As a result, it has become much easier for plaintiffs’ attorneys to argue that the true reason for rounding is more to save employers money from workers’ pay than to save them from accounting aggravation.

Over the last two and a half years, at least 15 reported decisions or settlements in federal district courts involved allegations of improper rounding. In those cases where courts certified class or collective actions, they often relied upon a common rounding policy or procedure applicable to the entire group of claimants. The risks involved in rounding

tend to increase with the number of claimants. For instance, the largest settlement that we identified in a case that included rounding allegations was \$19 million for a purported group of 13,000 employees. It is harder to value rounding cases because such cases often include other allegations, making it difficult to segregate the value of such claims from the value of the other claims in awards and settlements.

Like automatic deductions for meal breaks, the practice of rounding is lawful. The DOL accepts rounding if the arrangement devised by the employer averages out so employees are “fully compensated for all the time they have actually worked.”⁹ The problem with rounding is that the net effect may be that the employee’s time is always rounded down, but never rounded up. Regardless of whether the employer or the employee is the more frequent beneficiary of the rounding policy, the litigation risk is that even a few employees negatively impacted by the policy can turn a personal gripe into a costly “conditionally certified” collective action.

3. Remote Work

The concept of “remote work” involves various circumstances in which an employee is able to perform work outside of visual observation from a supervisor or active monitoring by the employer. Examples of remote work include remotely logging on to a computer system or accessing company emails on a Blackberry, driving for work-related purposes, reviewing files or materials or taking phone calls at home. Many employers struggle with how to account for and compensate employees for such time, if at all. Risks for these types of situations can be significant and unexpected. For instance Sears Roebuck entered into a \$15 million settlement for failing to properly pay employees who began their workday at home by checking computers.

The FLSA recordkeeping regulations will likely have the most significant impact of the Plan/Prevent/Protect initiative by broadening the DOL’s ability to monitor compliance with the FLSA.

4. Off-the-Clock Work

Off-the-clock work occurs whenever an employee performs work while on work premises, but not clocked in, whether before or after shifts or during meal periods. The amount of unpaid time, and by extension the monetary liability, in

off-the-clock situations can reach significant levels especially if employees fall into the habits that create off-the-clock issues, such as arriving early, skipping lunch or staying on past the end of the shift. The risk is exacerbated if frontline supervisors create the impression that “going above and beyond” in service to the business and its customers means working longer as opposed to working harder or more efficiently. In one of the matters we reviewed for this paper, a major grocery store chain entered into a \$53.3 million settlement for alleged off-the-clock work. Although it can be a source of significant liability, off-the-clock work can be averted mostly through implementation and strict enforcement of a clear, written timekeeping policy that includes the following:

- Requiring employees to accurately record all work time and submit completed, signed time records in a timely manner.
- Strictly prohibiting off-the-clock work. Prohibiting managers from requesting/requiring off-the-clock work or suggesting it is acceptable.
- Mandatory process for reviewing exceptions or modifications to time entries to identify reasons why frontline supervisors modify time entries of subordinates and ensure frontline supervisors do not erase any legitimate work time.
- Mandatory reporting of all suspected off-the-clock work so it can be investigated and corrected.
- Availability of an internal mechanism for hourly employees to complain about uncompensated work.
- Prohibiting employees from arriving at their work station before set start time.
- Automatic discipline of employees who violate the timekeeping policy.

One of the most difficult issues in off-the-clock work involves pre- and post-shift activities (referred to in DOL parlance as preliminary and postliminary activities under the Portal-to-Portal Act of 1947 amendment to the FLSA),¹⁰ which involve numerous tasks that may have to be performed in conjunction with the work required. Examples of such activities include: putting on and taking off specialized clothing or gear (referred to as “donning and doffing” in DOL regulations), and booting up a computer or logging on to a network. Whether such tasks are compensable can be complex and often require legal analysis. Activities performed before or after the regular work shift, on or off the production line, generally are compensable under the FLSA if those activities are an integral and indispensable part of the principal job activities.¹¹ Not every activity that is indispensable, such as the requirement to wear a uniform, is inherently integral to the job.¹²

5. Failure to Properly Calculate the “Regular Rate”

In addition to ensuring that time is recorded correctly, employers are also required to calculate employee compensation correctly under the FLSA. Another litigation trend involves errors in factoring the value of bonuses and commissions for hourly employees who work overtime. Overtime is calculated at a 50% premium rate from the regular rate of pay for hours worked over 40. The regular rate of pay includes not only the hourly wage paid to an employee, but in most cases also includes other forms of non-discretionary compensation such as bonuses, incentive pay, commissions, shift differentials or retroactive pay increases.¹³

Non-discretionary bonuses and commissions can be problematic because they generally must be apportioned back over the period in which they were earned.¹⁴ This requires retroactively calculating the regular rate of pay for every work week in which overtime was paid to ensure the accuracy of the regular rate of pay upon which the overtime rate was calculated. To avoid such calculations, employers can use a bonus or commission structure that is paid out as a percentage of total compensation. Because a percentage bonus of this type inherently accounts for overtime pay received, no recalculation is necessary.¹⁵ Advances in the quality of integrated record-keeping and payroll software available to most employers are also an attractive option. First, percentage bonuses, which are often less precise in creating compensation incentives, become less necessary when an employer adopts an integrated system that can easily handle bonus recalculations without requiring manual work from payroll personnel. Second, it is difficult for an employer to argue that errors in manual calculations are excusable when accurate integrated software is available. Thus, because of the implications they may have, it is important for employers to carefully consider the timekeeping and payroll processes they use in calculating incentive compensation.

IDENTIFYING AND ATTACKING PROBLEMS THROUGH TIMEKEEPING PRACTICES

Employers can minimize the risks associated with every one of the litigation trend areas identified above by adopting the following practices:

- Train employees and managers regarding hours worked and reinforce that training over time;
- Promulgate clear timekeeping policies;
- Adopt accurate timekeeping software with the ability to generate reports suitable for periodic auditing;
- Devise a reporting and audit protocol to monitor hours worked reports;

- Provide an internal mechanism for managers and employees to report suspected timekeeping or pay inaccuracies; and
- Require employees to certify that their time records and paychecks accurately reflect time worked and pay due.

Adopting these practices can help employers stay ahead of the litigation trends by identifying potential problems through one of three means: (1) employee complaint; (2) manager report; or (3) audit result. Many of the “red flags” that may suggest the existence of a time-reporting issue depend on visual observation. They include seeing employees take files or work home, working during meal periods or eating at their work stations, and arriving early. Auditing becomes particularly important for employers to root out bad habits or complacency that could result in less than full compliance with written policies. Knowing that auditing and possible discipline is inevitable will lead most employees and frontline supervisors to be more mindful of timekeeping policies.

The DOL’s new emphasis on compliance and enforcement strongly suggests that employers should actively assess wage and hour compliance and implement policies and recordkeeping software to address any issues.

In a 2011 report published by Aberdeen Group, “Time and Attendance Strategies: Beyond Accuracy and Compliance,” compliance with regulatory requirements or union agreements is cited among the top pressures driving investments in workforce management technology. Aberdeen uses four metrics to reflect an organization’s ability to reduce payroll errors, minimize inaccuracies, and improve business outcomes, one of which is improvement in audit score over the previous period in which it was measured. Analysis shows organizations using automated time and attendance solutions integrated with payroll and leave management saw a 61% improvement in compliance audit scores over companies that did not automate time and attendance or integrate time and attendance with payroll.

CONCLUSION

By implementing a wage and hour compliance program, the prepared employer can minimize exposure both before and at the onset of litigation. Specifically, the implementation of policies, training and auditing in conjunction with an automated timekeeping and payroll system will help an employer minimize internal employee complaints and address those that may still arise. Even if one or more employees elect to proceed with litigation, the prepared employer can use its compliance efforts, including data and reports from its timekeeping and payroll software, not only to demonstrate compliance with the FLSA, but also to establish that employees have different work patterns and time-reporting practices, even though they are subject to identical policies, providing individualized defenses against potential plaintiffs and making collective treatment more difficult to secure and the litigation less desirable to plaintiff's counsel.

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² 29 U.S.C. § 201 et seq.

³ Michael Orey, *Wage Wars*, BUSINESS WEEK, Oct. 1, 2007.

⁴ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. Department of Labor, <http://www.dol.gov/oasam/programs/history/flsa1938.htm>.

⁵ http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf. The new requirements are similar to those the DOL has imposed on employers with multiple locations and repeat FLSA compliance issues, but now these requirements will be imposed on employers with far greater frequency, even in the absence of violations. For example, the DOL has indicated it expects companies relying upon the services of independent contractors to prepare written explanations of why the workers are contractors rather than employees and provide the explanations to the contractors, even without DOL involvement. Similarly, the DOL now expects that "[a]ny employers that seek to exclude workers from the FLSA's coverage will be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to [Wage and Hour Division] enforcement personnel who might request it."

⁶ *Id.*

⁷ *Cornn v. United Parcel Serv., Inc.*, C-03-2001-TEH (N.D. Cal. 2003) (Doc 288 Apr. 17, 2007).

⁸ See Zivali v. AT&T Mobility, LLC, 2011 U.S. Dist. LEXIS 50707 (S.D.N.Y. May 11, 2011) for an analysis of the benefits of such a system.

⁹ 29 C.F.R. § 785.48.

¹⁰ 29 U.S.C. §§ 251-262.

¹¹ *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956) ("activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered [employees] are employed and are not specifically excluded" by the FLSA).

¹² See, e.g., *Bamonte v. City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010) (holding that the donning and doffing of police uniform and gear was indispensable but not integral); see also *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 590 (2d Cir. 2007).

¹³ See 29 U.S.C. § 207(e); 29 C.F.R. §§ 778.108 & 778.200.

¹⁴ See 29 C.F.R. §§ 778.208-09.

¹⁵ See 29 C.F.R. § 778.210.