



# SURVIVING THE WAGE & HOUR TIDAL WAVE

By  
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**T**he number of wage and hour lawsuits under the Fair Labor Standards Act of 1938 ("FLSA") involving claims for unpaid overtime has risen dramatically during the last several years. To compound the problem, wage and hour lawsuits naturally lend themselves to becoming large class action lawsuits (known as "collective" actions). As a result, employers today are more likely than ever before to fall victim to wage and hour lawsuits that are extremely disruptive and economically devastating.

Statistics show that the number of FLSA collective action lawsuits has grown by 230% since 1997. In the last week of February 2007 (a period of five days) in the Southern

District of Florida, there were 25 collective actions and five multiple plaintiff lawsuits filed alleging wage and hour violations. This trend has stayed consistent for months, throughout all of the courts in Florida and across the nation.

A collective action under the FLSA potentially involves numerous employees. Generally, a single plaintiff files a lawsuit on behalf of himself and "all others similarly situated." The plaintiff then asks the Court to allow him to send out a Notice to all employees in a particular position who are current employees or who worked there within the past three years. The Notice is an invitation to join the lawsuit and typically, there is a 20-30% opt-in rate of

people who join the lawsuit. The procedural steps taken at the beginning of a collective action lawsuit are complex and time consuming, however, these procedural maneuvers are essential to minimizing liability.

A wage and hour lawsuit can have an extraordinary financial burden on an employer. Recent figures are shocking, including a \$35 million settlement by Pacific Bell and \$135 million settlement by State Farm. Admittedly, these examples involve very large employers and hundreds or even thousands of plaintiffs. However, small and medium sized companies can also fall victim to FLSA class action lawsuits, and the financial impact of those cases can be devastating. For example, a small

company that employs 50 people could be faced with a collective action involving one small group of employees (such as mechanics or electricians), which could cost upward of \$150,000 (including back wages, attorneys' fees and liquidated damages).

It is not only the Wal-Marts and the State Farms are that being sued; it is companies of every size. And it is often the little things that lead to lawsuits. The following are the most common violations that lead to lawsuits and the steps each company can take to prevent these mistakes.

### 1. Supervisor approval of overtime.

The law requires that employees be paid overtime for all hours worked, whether or not the employee has permission to perform that work. Provided the work performed is done for the benefit of the company and the employer knows or should know that the work is being performed, it must be compensated. Many companies have policies that require supervisor approval to perform overtime work. While such policies are permissible and

even encouraged, it is the implementation of the policies that raise questions. Based on these policies, many supervisors believe that if the overtime is not approved, it is not compensated. This is not true; the employee must be paid for the hours worked. The appropriate step for a violation of this policy is a warning for violating the policy, but the time must still be paid.

**2. Meal breaks.** The law requires that in order to constitute an uncompensated meal break, the "break" must be for at least 30 minutes and be uninterrupted. A common error is that employers allow workers to aggregate the break period so that if they take a total of 30 minutes of break in a day, that constitutes an unpaid lunch period. This is an improper application of the meal break law because the break must be 30 consecutive minutes of uninterrupted time. Many supervisors do not understand this requirement and unknowingly permit a violation of the FLSA. Another common problem is taking an automatic meal break deduction without making certain that employees are

actually taking their uninterrupted meal break. If using an automatic deduction, an employer needs to have safeguards in place to regulate the breaks.

### 3. Failure to properly calculate regular rate of pay.

Under the law, employees must be paid time and a half of their regular rate of pay for all hours over 40. Problems arise in determining whether a bonus needs to be added to determine regular rate of pay. The general rule is that bonuses related to hours worked, productivity and efficiency must be applied to the regular rate of pay. Bonuses that are purely discretionary as to amount and entitlement do not have to be included. If a bonus needs to be included in the regular rate of pay, then, using the specific formula in the Regulations, the employer needs to calculate the new regular rate of pay, and the employee needs to be paid overtime at a rate of time and one-half this new regular rate in any work week within the period covered by the bonus. This may require an additional payment to make up the difference between the old regular rate and this new regular rate.

**4. Piece rate compensation.** Many employers choose to use the piece rate method of compensation without understanding its application. If an employee who is being paid by the piece works more than 40 hours in a workweek, she must be paid  $\frac{1}{2}$  time for all hours over 40. Therefore, the employer must keep track of the hours worked and evaluate on a weekly basis whether the employee worked more than 40 hours. If the employee does work more than 40 hours, her total piece rate pay must be divided by her total hours worked, and she must be paid an additional  $\frac{1}{2}$  this rate for each hour of overtime worked during that week.



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### 5. Arriving early to prepare for shift.

If an employee arrives to work before her shift starts and begins organizing herself for the day, there is a very strong argument that this is compensable. It is necessary for an employer to put practices into place that prevent employees from coming to work early or staying late without permission. These activities are especially hard to police when the employee is doing this on her own volition and does not seek payment. Unfortunately, the test under the FLSA is not whether the employee asked to be paid for the time but whether the law requires the employee to be paid for that time.

**6. Altering time sheets.** A time-keeping system which allows for the employee to be responsible for keeping track of his time and which requires employee verification of hours worked offers the most protection under the law. It is important to take this a step further and require

employee verification for any changes made to such time sheets. The best practice is to have time sheets reviewed by a supervisor and all changes, no matter how slight, "approved" by the employee.

**7. Work from home or while in commute.** With the advances in technology come new wage and hour concerns for a non-exempt employee including receiving and responding to emails after hours, communicating via telephone after hours, or using the internet at home for business reasons. Whether such time is compensable depends on the length of time the employee spends on the tasks and how frequently it happens. If the activity lasts just a few minutes in time and does not happen often, then it can probably be classified as *de minimis* and not compensable. The problem is in controlling these activities so that they remain *de minimis*. The best practice is to

not allow non-exempt employees to perform any work from home or during their commute.

As the wage and hour collective action tidal wave continues to roll across the country, it is vital that companies take steps to protect themselves and make certain that pay policies and practices are in compliance with the law. It does not matter the size or location of the company, every company needs to be in compliance and protect itself. ■

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