



WHAT'S NEW, PUSSYCAT

THE PERFECT STORM OF OVERTIME LITIGATION

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A NATIONAL WAVE OF FLSA LITIGATION

- National Statistics:
 - 2013 tracking year (year ending 3/30/13)
 - 7764 FLSA cases filed
 - Increase of 10% over 2012
 - According to ADP report, FLSA cases represent ~90% of all federal class and collective action lawsuits filed
 - U.S. Department of Labor
 - Believes 70% of employers are not in full compliance with the FLSA



A LOCAL WAVE OF FLSA LITIGATION

- What do filings in the Southern District of Texas look like?
 - Cases Filed Between 1/1/13 and 8/31/13
 - 231 new FLSA lawsuits filed
 - Law firms – Not who you'd expect
 - Issues – Same types of issues
 - Many energy company and heavy industry defendants
 - Individual defendants were named in 116 cases
 - 20% of lawsuits had been settled and dismissed by early September



CASES FILED IN S.D. TEXAS

- Which lawyers/firms filed most cases?
 - Ross Law Group (39)
 - Bruckner Burch (32)
 - Josef F. Buenker (15)
 - Moore & Associates (14)
 - Kennedy Hodges (12)
 - Fibich Hampton (10)
 - Joe M. Williams & Assoc. (10)

- United States Department of Labor (1)



CASES FILED IN S.D. TEXAS

- Which lawyers/firms named individuals as defendants?
 - Ross Law Group (18)
 - Bruckner Burch (14)
 - Josef F. Buenker (10)
 - Moore & Associates (8)
 - Kennedy Hodges (5)
 - Joe M. Williams & Assoc. (5)
 - Fibich Hampton (0)



CASES FILED IN S.D. TEXAS

- What overtime issues were asserted?
 - Use of straight time OT for non-exempt employees
 - Unpaid wages for time spent texting, phoning, emailing and remotely computing
 - Failure to include forms of compensation in regular rate (bonus, commission, day rate, etc.)
 - Improper deductions destroying exempt status, causing OT to be owed and unpaid (time off, partial day pay, credit card charges, tool replacement)
 - Misclassification as exempt
 - Independent contractor status



WHAT IS DRIVING THESE TRENDS?

- More awareness of overtime rights and litigation
 - DOL and state agency outreach
 - News reports about FLSA cases
 - Social media and online information/ads
- Companies still not paying properly
 - FLSA requirements don't easily mesh with modern way of working
 - Industry “lemming effect”
 - Companies' fear of auditing and self-fixing
- Agency Activism
 - More on-sites and desk audits by DOL
 - More cooperation and information sharing between agencies (i.e. independent contractor issues)



WHY CONDUCT YOUR OWN AUDIT?

(INSTEAD OF WAITING FOR THE GOVERNMENT OR A PLAINTIFF'S LAWYER TO DO IT FOR YOU)

- Avoid or minimize litigation
- Avoid or minimize liquidated damages, fines and/or penalties
- Compensation problems are usually easily identifiable and can be fixed
- Pay administrators and managers can be held personally liable (\$\$ and/or jail)
- Pay practices can impact federal contractor status



AUDIT BASICS – HAVING COUNSEL MATTERS

- Conduct audit under direction of counsel
 - Attorney-client privilege and work-product protections
- Having a non-lawyer oversee and conduct the audit may make things worse
 - All communications may be discoverable, and
 - It could set up a willful finding if you are audited or sued
 - No E&O (malpractice) insurance coverage if mistakes are made



WHAT IS ATTORNEY-CLIENT PRIVILEGE?

- U.S. Supreme Court in *Upjohn* (1981):
 - The purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. . . . ‘[T]he purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys.’”
 - Must be seeking or obtaining legal advice – simply copying a lawyer on emails is not enough



AUDIT BASICS – BEST PRACTICES

- Knowledgeable HR, payroll personnel and key managers should be involved
- Audit without fear of finding problems (you should actually be looking for them)
- Carefully manage communications about the audit
- Make corrections carefully and thoughtfully
 - Actions and wording matter



AUDITING PAY PRACTICES

- Exempt classification
- Payment methods/types for non-exempt employees
- Equal Pay Act issues
- Administration of benefits linked to compensation (401k)
- Use of “independent contractors”
- Executive compensation agreements and compliance with IRC 409A
- Recordkeeping and posting



EQUAL PAY ACT AND THE OFCCP'S INITIATIVES?

- Equal Pay Act
 - Identify factors influencing compensation
 - Review compensation policies and practices
 - Assess performance metrics used for compensation
- Recently Published OFCCP Rules
 - Applicable to federal contractors
 - Look at language in master service agreements and purchasing agreements for EEO 11246 “pass down”



EQUAL PAY ISSUES – GENDER & NEGOTIATION

- 2012 Study by National Bureau of Economic Research (quoted by WSJ online April 1, 2013)
 - Two advertisements placed for same position in nine U.S. cities:
 - First was ambiguous as to salary negotiations
 - Second explicitly invited salary negotiations
 - Approx. 2500 job seekers responded to ads
 - Findings:
 - Men more likely to negotiate when it was ambiguous
 - **Women more likely to negotiate when invited to do so**
 - Gender played less role if negotiation was impersonal, as opposed to face to face
 - **Women disproportionately applied for position for which salary negotiation was invited**



AUDITING EXEMPT AND NON-EXEMPT EMPLOYEE PAY?

- Classification of Employees as Exempt
 - Does each employee qualify based on actual duties?
 - What do: “independent” “discretion” “judgment” and “matters of significance” really mean?
 - Watch Out For Deductions From Pay
 - In what circumstances does company make deductions?
 - Does company have proper, signed authorization or valid garnishment order?
- Payment of Wages to Non-Exempt Employees
 - Payment for all “hours worked”?
 - On call time
 - Blackberry and iPhone time
 - Are non-discretionary payments included in “regular rate”?
 - Do time sheets match pay records?



WHAT ELSE SHOULD BE AUDITED?

- Administration of Benefits Tied to Compensation
 - 401k and retirement plan “matching”
 - Based on base pay or all compensation?
 - Severance benefits
 - Paid in a consistent manner pursuant to a written policy?
 - Pursuant to an unwritten policy?
 - Pursuant to an ad hoc practice?
- Frequency of Payment of Wages
- Direct Deposit Practices
- Timing of Payment of Last Paycheck



WHAT ELSE SHOULD BE AUDITED?

- Use of Independent Contractors
 - Factual inquiry
 - Nature and scope of work
 - Length of relationship
 - IRS and state agencies may use different independent contractor standards
 - State agencies are actively auditing and sharing info

- Executive Compensation Agreements
 - Applicability of IRC 409A
 - Severance, change of control, and deferred comp arrangements



WHAT RECORDS SHOULD BE AUDITED?

- Payroll Records
 - Form W-4
 - Time Sheets
 - Pay Records
 - Authorizations for Deductions/Withholding
 - Garnishment Orders
- Records of PTO Accrued and Used
- Required Posters
- Job Descriptions
- Performance Appraisals and Disciplinary Documents Affecting Compensation
- Written Company Policies
 - Hours of work, expense reimbursement, overtime, deductions, vacation, travel, etc.
- Severance Plans/Policies and Documents Reflecting Severance “Practices”
- Independent Contractor “Agreements” and I-9s
- 401k and Retirement Plan Records
- Executive Compensation Agreements (Severance, Change of Control, Deferred Comp)



YOU FOUND PROBLEMS – NOW WHAT?

○ Multiple Options:

1. Fix for future, fix in past
 - a. Eliminates new liability
 - b. Significantly reduces risk of lawsuit
 - c. Can be very hard to accomplish with former employees
 - d. Communication must be well drafted

2. Fix for future, leave the past behind
 - a. Eliminates new liability
 - b. Preserves past liability (no closure)
 - c. May facilitate willful finding in some courts
 - d. Careful communication is key

3. Don't fix anything, keep hope alive
 - a. Prepare for litigation, expect a willful finding



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