Three Hot Wage & Hour Topics in 30 Minutes

Chelsea D. Petersen

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Wage & Hour Overview

- Fair Labor Standards Act (FLSA) and state equivalents:
  - Minimum wage
  - Overtime
  - Meal and rest breaks
  - Recordkeeping

- Failure to comply can lead to
  - Back wages
  - Double damages and other penalties
  - Attorneys’ fees
  - Three year statute of limitations if willful

- Ripe for litigation and particularly class/collective action cases
Exponential Growth in Wage & Hour Litigation

Federal Judicial Center Report:

- FLSA filings **up 10%** for period 4/1/13 – 3/31/14
  - 7,882 collective action suits filed
  - Dramatic jump from 1% increase in same period last year
  - Up approximately 400% from 2000

- In contrast, discrimination class action filings dropped from 14,260 to 12,311 in same period last year

- State filings likely follow this trend
Exponential Growth
Why the Increase?

- FLSA is outdated - easy to make mistakes and easy to exploit
- Collective action certification standard is low
- Class action certification standards arguably much higher post-*Dukes*
- Slowly improving economy
- Social media
- $$$
Three Hot Areas in Wage & Hour Litigation

- Misclassification
- “Off-the-clock” work by nonexempt employees
- Unpaid interns
Hot Topic #1: Misclassification Cases

- Not new - just *more*
- Two key areas:
  - Misclassifying employees as exempt from FLSA
  - Misclassifying employees as independent contractors
Misclassification Cases
“White Collar” Exemptions

- Executive
- Administrative
- Learned professional
- Creative professional
- Outside sales
- Computer employee
- Highly compensated employee
Misclassification Cases
Exemption Tests

- Example: Administrative Exemption
  - Primary duty is performance of office or nonmanual work directly related to the management or general business operations
  - Includes the exercise of **discretion** and **independent judgment** with respect to **matters of significance**

- It’s not just you
Misclassification Cases
Changes on the Horizon

- President Obama’s March 2014 memorandum: millions of Americans lack the protections of overtime and the right to the minimum wage
- Directs DOL to simplify regulations to make them easier to understand and apply
- Rulemaking process likely to take 12 to 18 months
Misclassification Cases – Exemptions
Minimizing Risk

- Conduct *privileged* audit
  - What are the current job duties?
  - Are exempt duties the primary duties of the position?
  - Do job descriptions and position titles reflect exempt status?
  - When in doubt: nonexempt
Misclassification Cases
Independent Contractors

- Independent contractors are not employees, so:
  - No tax withholding (income tax, Social Security, Medicare, unemployment funds)
  - No benefits
  - Limitations on employment-related litigation

- Risk of misclassifying:
  - Tax penalties
  - Failure to provide benefits
  - Liability for employment-related litigation
Misclassification Cases – Independent Contractors

Various Tests

- Numerous tests are used:
  - Common law (master-servant) test
  - IRS 20-factor test
  - Economic realities test
  - DOL 7-factor test
  - Unemployment compensation test

- Central issue: right to control how the work is performed
- Always fact-specific
Misclassification Cases
Focus on Enforcement

- Wage and Hour Division (WHD) has signed cooperative agreements with the IRS and 15 states to fight misclassification

- David Weil as new head of WHD – no question this is primary focus
Misclassification Cases
Weil’s Targeted Industries

- Targeted industries:
  - Agriculture
  - Construction
  - Grocery Stores
  - Health Care
  - Home Health Care
  - Hospitality
  - Janitorial
  - Landscaping
  - Moving Companies
  - Restaurants
  - Retail
Misclassification Cases – Independent Contractors
Minimizing Risk

- Privileged audit
- Written agreement before work begins
- No required reports
- No set work hours or schedule
- No set work location
- Limit duration (term)
- Differentiate from employees (badges, emails, meetings)
- Red flags:
  - Former employees retained as contractors
  - Same job, different label
Hot Topic #2: “Off-the-Clock” Litigation

- Increase in “off-the-clock” work claims by nonexempt employees:
  - Donning and doffing
  - Security line
  - Computer boot-up/login
  - Rest and meal periods

- Abundance of data makes it easy:
  - Badge swipes
  - Mobile devices
  - Computer logins
Compensable Time
What Is, and What Is Not

- Pay for all work “suffered or permitted”

- From first **principal activity** until the end of the last **principal activity**, excluding “bona fide” meal periods

- Preliminary/postliminary tasks compensable if **integral and indispensable**
  - Integral: “necessary” (needed to do the job)
  - Indispensable: “essential to completeness”; “organically joined or linked” (job cannot be done without it)
De Minimis Time

- Limited exception to rule that all time worked is compensable
- “Insubstantial and insignificant” amounts of time
- A few seconds or minutes
- Courts may consider:
  - Administrative difficulty of recording the time
  - Aggregate size of the claim
  - Regularity of claimants’ performance of the work
Busk v. Integrity Staffing Solutions, Inc.

- Employees seek back pay for time spent passing through security screenings at the end of their shifts
- But not just employees
- Ninth Circuit: plaintiffs’ class claims could proceed
- Supreme Court granted certiorari
- Copycat suits
“Off-the-Clock” Cases
Minimizing Risk

- Review timekeeping policies and training
  - Expressly prohibit any “off-the-clock” work
  - Require employees to track own hours
  - Require employees to certify recorded time is correct
  - Prohibit supervisor alterations without consent
  - Require authorization for overtime
  - Provide avenues to report pay errors
  - Discipline for failure to comply

- Look at the data you keep from a plaintiff lawyer’s lens
- Consider data retention periods and policies
Hot Topic #3: The Unpaid Intern

- Interns claim that they are employees
- Interns seek to recover wages for all hours worked and any overtime
Internships
Recent Cases

- Trending in media, entertainment and fashion industries:
  - *Glatt v. Fox Searchlight Pictures Inc.*
  - *Wang v. The Hearst Corp.*
  - *Ballinger v. Advance Magazine Publishers, Inc.* (Condé Nast)
  - *Moore v. NBC Universal, Inc.*
  - Other companies under attack: Warner Music Group, Atlantic Records, Gawker Media, Viacom, Sony, Universal Music Group, Bad Boy Entertainment, and Donna Karan
Unpaid Interns – The FLSA Test

The FLSA Test for Intern Status – all six must be satisfied:

1. Similar to training in an educational environment;
2. For the benefit of the intern;
3. Does not displace regular employee;
4. Company derives no immediate advantage and operations may actually be impeded;
5. No entitlement to job at the conclusion of the internship;
6. Understanding of no wages.
Unpaid Interns – Minimizing Risk

- Ensure postings do not suggest internship is or will lead to a job
- Provide a clear offer letter: highlight educational opportunities and unpaid status
- Tailor the internship and train supervisors
- Ensure that the intern does not replace regular staff
- Verify academic credit
- Pay minimum wage?