

Overtime Lawsuits: How Does a \$500 Mistake Turn into a \$100,000 potential liability?

Joe Smith was a terrible employee. He argued with his boss; he had a poor attitude; he was rude to customers. His employer, XYZ Corp., had enough and fired Joe. Joe filed for unemployment. After he filed, Joe received a flurry of letters from lawyers specializing in bringing cases for overtime. All of the letters told Joe that XYZ Corp. may owe him overtime and that he should call for a “free consultation.” Joe, who had lots of free time, said “what the heck,” and called one of the lawyers. After speaking to Joe for fifteen minutes, the lawyer determined that XYZ Corp.’s payroll person had excluded an hour of overtime each week. Joe’s clocking in and working ten minutes early each day caused the payroll issue. The lawyer told Joe he had a claim against XYZ Corp. for \$500.00 in unpaid overtime and another \$500.00 in liquidated damages. Joe hired the lawyer. Without warning to XYZ Corp., the lawyer filed a federal lawsuit on behalf of Joe and other “similarly situated” employees for violation of the Fair Labor Standards Act.

Question: What does this lawsuit mean to XYZ Corp.?

Answer: A \$500 issue or unintentional error just escalated into an \$11,000.00 to \$101,000.00 potential liability for Joe’s ex-employer: (\$1,000 to Joe for unpaid overtime and liquidated damages and approximately \$5,000 to \$50,000 each to Joe’s attorney and XYZ Corp.’s attorney, depending on when and how the case was resolved).

Scenarios like the one above have occurred thousands of times in Florida during the past five years. Plaintiff’s attorneys specializing in Fair Labor Standards Act (“FLSA”) overtime cases, target both large and small employers: from the Walmart’s to the small “mom and pop” operations with just one or two employees. FLSA liability is perhaps the highest employment

law risk facing employers today, particularly in South Florida where there has been an unprecedented rash of overtime lawsuits.

The FLSA is a highly technical law that requires virtually all employers to pay overtime for all hours worked in excess of 40 hours in a work week. The Department of Labor has drafted phone-book size regulations interpreting the FLSA. These regulations are often difficult to understand and are sometimes illogical, both in a pure business sense and in what is fair to both the employee and the employer. The FLSA regulations are often debated and not easily understood by attorneys, judges and even Department of Labor personnel. In other words, the FLSA contains a multitude of traps which honest employers can spring on themselves without knowing it. Some of the more common traps are the following:

1. The common misconception that all "salaried" employees are always exempt from overtime.
2. The failure to pay for all hours worked during the work day in situations where the employee "clocks" in early, or out late, or works through a mandatory lunch break.
3. The misclassification of employee exemptions from overtime.
4. The misclassification of employees as independent contractors.
5. The failure to include certain compensation, like non-discretionary bonuses, or incentive compensation, into the overtime rate during weeks when employees work in excess of 40 hours.
6. The misconception that an employee can agree to waive the overtime premium and work at a straight time rate for hours worked in excess of 40 hours.

The financial risk associated with FLSA claims can be quite substantial despite the small amount of unpaid overtime that is typically at issue in an FLSA claim. The FLSA allows employees to recover all of the unpaid overtime for up to three years and also to recover “liquidated damages” equal to the unpaid overtime. The FLSA also has a class action component that can result in other similarly situated employees joining the lawsuit. For example, an employer sued for \$2,000 in unpaid overtime by an employee, who is one of ten employees performing the same job, could later find itself facing claims in the same lawsuit by all ten employees, for similar damages. Thus, a \$2,000 unpaid overtime claim could turn into a \$20,000 unpaid overtime claim, plus an additional liquidated damages equal to \$20,000.

More significantly, the employee bringing a successful FLSA claim can recover reasonable attorney fees in the dispute. Attorney fees are always part of the settlement value of a case. If a case is settled early, the fees necessary to settle the case could be in the \$3,000 to \$10,000 range. If the case goes to trial, the attorney fees could be in the \$25,000 to \$50,000 range, or even significantly higher depending on the complexity of the issues and the number of employees who could join the case.

The important point is that the amount of the employee’s attorney fees usually far exceeds the amount of unpaid overtime claimed. Also, because the employee’s potential attorney fees are escalated by the filing of a lawsuit, plaintiff’s lawyers specializing in overtime cases normally do not send demand letters. Instead, they proceed directly to litigation and file a federal lawsuit against the employer.

While some cases have defensible legal issues, many employers either cannot afford the exposure to their own legal expenses incurred in defending a federal lawsuit, or want to quickly cap their exposure. Plaintiff's lawyers understand the economics of FLSA cases very well and will not hesitate to file cases with defensible issues, or for nominal amounts of unpaid overtime, because the economics of defending a claim often results in a quick settlement involving payment of thousands of dollars in attorney fees to the Plaintiff's attorney.

How does an employer reduce its FLSA risk? All employers should have an attorney or other expert who understands the FLSA and its intricacies, review their job positions, payroll practices and time-record-keeping practices. Positions should be scrutinized to ensure that non-exempt employees have not been misclassified as exempt from overtime. There are sometimes arguments in support of and against making a position exempt from overtime. In such close calls, the best risk avoidance practice is usually to classify the position as non-exempt, and pay overtime. Moreover, payroll and time-record-keeping practices should be reviewed periodically to ensure that employees are being paid for all of the hours that they work. Finally, payroll personnel and managers should be counseled on the common misconceptions that lead to FLSA violations and the consequences of such violations.

Steven Parrish, Esq., frequently counsels employers about compliance with the FLSA and defends FLSA lawsuits. If you are unsure whether your company is complying with the FLSA, please feel free to contact Steven at 561-366-5349 or sparrish@broadandcassel.com.