

FLSA: Learning from Others

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This month we conclude our look into common liability issues under the Fair Labor Standards Act. As we warned in our last FLSA newsletter, employers would be wise to audit pay practices now to avoid liability down the road. Since 2000, the number of wage-related cases filed in federal courts has doubled, and most involve overtime claims. Some attribute this increase to a lack of clarity in federal law which has set rules for overtime wages since 1938. The recent update to the FLSA was designed to clarify issues about eligibility for exempt and non-exempt status, but many say the revisions only muddied the water and invited litigation. Others lay blame for the increase in FLSA claims at the feet of unscrupulous employers who are trying to avoid paying overtime. Another impetus for the increase is the fact that the government has stepped up enforcement of wage laws, leading to a spike in the collection of back wages. Again, most of these cases involve overtime claims. These lawsuits generate public attention through the press which, in turn, spawns more lawsuits. Whatever the reason for the increase in FLSA lawsuits, experts are calling it the nation's "fastest-growing legal battlefield between workers and companies." Since it is usually better to learn lessons vicariously rather than first-hand, let's examine some of the recent large cases and find out what went wrong for the employer.

- **Headline:** "Sterling Jewelers Agrees to Pay \$1.29 Million in Back Wages to 16,820 Workers in 41 States" Sterling's first mistake was a failure to include incentive pay in the calculation of overtime. The company's second mistake was their failure to pay employees for all hours worked. *Lessons: First, employers frequently violate the FLSA by failing to include shift differentials, on-call payments, non-discretionary bonuses, commissions and other forms of incentive earnings in non-exempt employees' overtime pay. Make sure that you are including these types of pay in overtime calculations. Secondly, make sure you are paying your non-exempt employees for all hours worked. Enforce the policy that no employee works overtime without approval, and all hours are recorded and signed off on by the supervisor.*
- **Headline:** "Gulf Coast Employers Agree to Pay Over \$362,000 in Back Wages for 680 Workers Engaged in Hurricane Clean-up and Rebuilding" The three companies involved in this case were hired to clean-up and reconstruct the casinos along the Mississippi Gulf Coast. All three of the firms misclassified workers as independent contractors and failed to pay the required overtime compensation. *Lesson: Many employers mistakenly assume that if they compensate workers using a Form 1099 (and don't withhold taxes, pay payroll taxes, or provide employee benefits), then the workers properly can be classified as "independent contractors." Misclassification of workers as independent contractors can result in substantial liability under the FLSA, including minimum wage and overtime back pay and other monetary penalties. The U. S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors to consider are: 1) The extent to which the services rendered are an integral part of the principal's business. 2) The permanency of the relationship. 3) The amount of the alleged contractor's investment in facilities and equipment. 4) The nature and degree of control by the principal. 5) The alleged contractor's opportunities for profit and loss. 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor. and 7) The degree of independent business organization and operation. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee vs. contractor status. Don't make the mistake of classifying an employee as an independent contractor.*
- **Headline:** "Group 1 Automotive Agrees to Pay \$388,766 in Back Wages to 1,478 Current and Former Employees" This company made a couple of mistakes, but the core of their problems was a failure to keep accurate time and payroll records. This failure led to underpayment of wages. *Lesson: Inherent in the legal requirement to pay for all hours worked and overtime for those hours over 40 is the requirement to maintain accurate records of your employees' time. Contrary to what many employers believe, keeping accurate records of time is not the employee's burden. If an employer has not kept accurate records to dispute an employee's claim of overtime hours, the government will typically take the employee's number. A time clock is the most accurate method; however, if you don't have a time clock, a timesheets signed by the employee and his supervisor is a good idea.*

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