Segale Consulting Services, LLC

Employees are Cashing in on Wage and Hour Litigation

In the federal reporting year ending March 31, 2011, there were 7,006 wage and hour claims filed in federal court across the US. That number is higher than the combine total of all other employment cases. The number of Fair Labor Standards Act cases increased by 325% over the past decade and 15% between 2010 and 2011. The trend every year is an upward trajectory as more and more employees, former employees and, most importantly, lawyers, are learning the lucrative nature of this type of action.

Law firms are aggressively marketing this type of litigation as the following ad running on Denver TV stations by Backus and Shanker illustrates:

"If you have worked more than 40 hours in any week without receiving overtime pay for each additional hour worked, you may be eligible for compensation. If you are owed overtime money, you may be entitled to more than just reimbursement for back wages for the overtime you are owed. You may also be entitled to recover additional money for each overtime violation called "liquidation damages". Plus you may also be entitled to recover attorney's fees and costs. Please know that retaliation by employers due to a claim is strictly prohibited! Contact our overtime lawyers to make sure you are receiving the compensation you are legally entitled to."

The FLSA was passed in 1938 and amended by the Portal-to-Portal Act in 1947. Among other worker protections, the law created a federal minimum wage and guaranteed nonexempt employees would receive time-and-a-half pay for overtime.

These cases are lucrative and have the added bonus of being much easier and less expensive to the law firms to try than discrimination cases. There is relatively little case law on this issue and the FSLA is complicated and employer's face a great deal of uncertainty in the proper application of this law. For example, what is a "work day"? The U.S. Supreme Court has interpreted the work day to be continuous until there is a definable break. How does the use of cell phones and other mobile technology create complications that are not addressed by this law.

The US Supreme Court issued its opinion in the *Christopher v. SmithKline Beacham Corp*. case on 6-12-2012.
The petitioners were employed by SmithKline as pharmaceutical sales representatives for roughly four years, and during that time their primary objective was sales to physicians. Each week, the sales people spent about 40 hours calling on physicians and an additional 10-20 hours per week performing other work related tasks. Their pay included both a base salary and incentive pay. Petitioners filed suit, alleging that respondent violated the FLSA by failing to compensate them for overtime.
US Supreme Court held that under the FLSA, employers are required to pay employees overtime wages, but there is a specific exemption for workers employed "in the capacity of

outside salesman". Congress did not provide a definition of that term but the most reasonable interpretation of the Department of Labor's regulations is that petitioners qualify as outside salesmen.

As of 7/23/2012, there is new case law in California as issued by an Appellate Court regarding the pay owed to insurance adjustors. The case, Harris v. Superior Court of Los Angeles County, Frances Harris et al, v. The Superior Court of Los Angeles County, Liberty Mutual Insurance Company, et al, consolidated four related cases into one class action lawsuit. The allegations in this class action were that adjusters are owed overtime. The employers argued that an administrative exemption to paying overtime applied to claims adjusters. The court has ruled against Liberty Mutual stating that "adjusters' primary work duties are the day-to-day tasks of adjusting individual claims not directly relating to (Liberty Mutual's) management policies or general business operations." This ruling allows the employees motion to sue as a class.

So what impact has all of this litigation had on the insurance marketplace? Combining frequency with severity and an inability to forecast compliance with an archaic and badly written law has resulted in insurance companies deciding to remove coverage from the Employment Practices Liability policies. There are a few carriers that provide extremely small sub-limits (example $25,000) for payment of defense only – no indemnity for damages.

The client must be made aware of this extremely vulnerable point in their business operations and the lack of available insurance coverage for this risk. Make sure that the notification to the client is placed in writing and acknowledged by the client in writing.

There may be risk reduction techniques that could be of help, sometimes not even complicated ones. I just heard the story of a recent claim brought by the chef of a restaurant. He would come in to work, clock in, go to lunch but not clock out. He then would clock out at the end of his regular shift. Fourteen years later, he is laid off and files suit, claiming that he worked over 8 hours in a day and more than 40 hours a week and was entitled to overtime for all of those years. Had the employer had someone in accounting review the time cards, the suit could have been completely avoided.