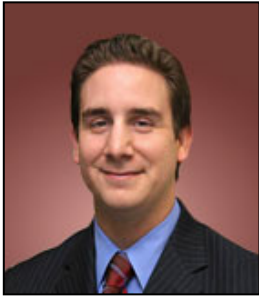


The Legal Center
One Riverfront Plaza
Newark, NJ 07102
(973) 623-1000



400 Park Avenue
Suite 1420
New York, NY 10022
(212) 432-7419

www.podvey.com



The Eastern District of New York Rules Employees' Putative Class Action Claims for Unpaid Overtime Wages Under RICO are Preempted by the FLSA

Anthony M. Rainone, Esq.
arainone@podvey.com

DeSilva v. North Shore-Long Island Jewish Health System, Inc.,
-- F. Supp.2d ----, 2011 WL 899296 (E.D.N.Y. Mar. 16, 2011)

The Eastern District of New York recently issued a comprehensive opinion and decision dismissing the large majority of a group of employees' putative class action alleging, *inter alia*, violation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA") and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* ("RICO"), in addition to numerous state law claims. The suit arose out of the employer's alleged failure to pay straight time and overtime pay in addition to failing to credit the employees' retirement plan for work performed.

Factual Background

Plaintiffs were a group of employees who worked in nursing positions for the employer, defendant North Shore-Long Island Jewish Health Care, Inc., an operator of over seventy health care facilities. The underlying theory of the case was that the employer maintained three illegal pay policies; specifically, a meal and break deduction policy, an unpaid pre and post-schedule work policy, and an unpaid training policy. Plaintiffs sought to represent a class of over 38,000 current and former employees.

The FLSA and NY Labor Law Overtime Wage Claims

The Court first addressed the claims for failing to pay straight and overtime wages in violation

of the FLSA. The statute provides that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."¹ Violation of this section subjects the employer to liability for the unpaid wages and liquidated damages in an equal amount.²

Because the plaintiffs failed – after being given leave to do so – to plead sufficient facts to support an FLSA or New York Labor Law claim for failure to pay overtime wages, the Court dismissed this portion of plaintiffs' claims. With regard to the straight wage claims (*i.e.*, failure to pay wages for hours worked under forty hours per week), the court found that these claims could not be pursued under the FLSA but, rather, as part of plaintiffs' state law common law claims.

RICO Claim

Turning to the civil RICO claim, the Court rejected this claim outright finding it was preempted by the FLSA. Plaintiffs alleged that the employer devised a scheme to defraud the employees by concealing the willful and systematic withholding from plaintiffs their regular or statutorily required pay for all hours worked. The alleged predicate act – which is required to state a RICO claim – was the mailing of misleading paychecks. If plaintiffs could proceed under RICO, the employer would not only face liability under the FLSA (double the

www.podvey.com

damages and attorneys' fees and costs) but also be exposed to treble damages under RICO.

The court recognized that the FLSA sets the floor for wages and hours worked and that states may (and have) legislated more than the minimum pay or less than the maximum hours permissible without running afoul of the FLSA. This is allowed where a statute merely sets up obstacles for states to legislate around (known as "obstacle preemption") rather than where a statute prohibits any legislation all together (known as "field preemption").

The court held that the RICO claim was duplicative of the FLSA overtime claim writing, "the broadness of the FLSA's remedial scheme precludes, or otherwise renders unavailable, civil RICO actions as a method for vindicating rights established under the FLSA."³ With regard to preemption, the Court noted the debate among courts and scholars whether one federal statute can ever "preempt" another federal statute.⁴ But acknowledging that the Second Circuit has not yet addressed the issue, the District Judge held that the FLSA is the "exclusive remedy for wage and hour violations that fall within the FLSA's scope."⁵ Because the RICO claim stemmed from the failure to pay overtime wages, which was covered by the FLSA, the court dismissed the RICO claim based upon the failure to pay overtime wages.

With regard to the claims for straight wages, these claims were also dismissed but for different reasons. Because these were claims that did not fall within the FLSA's scope, they were not preempted by the FLSA. The court, however, found that plaintiffs did not have standing because the alleged predicate act (mailing the paychecks) did not proximately cause plaintiffs any injury.

State Common Law Claims

The state law claims for failure to pay overtime wages were disposed of easily. That is, they were preempted by the FLSA and, therefore,

dismissed. The court rejected a Ninth Circuit decision⁶ to the contrary on the preemption issue and, instead, relied on "numerous other courts that have found that the FLSA's civil enforcement scheme to be exclusive . . ."⁷

But with regard to the state law claims for failure to pay straight wages under forty hours per week, these did not arise under the FLSA and, therefore, were not preempted. But the majority of the nine common law causes of action were dismissed for insufficient pleading.

Implications for Employers

This lengthy decision has positive and negative aspects for employers. Although not binding on other trial courts, it provides employers and their counsel an outline of the argument to dismiss a RICO claim by an employee for overtime wages because the claim is preempted by the FLSA. On the other hand, provided an employee has the proper allegations, it appears that a RICO claim may in fact exist for failure to pay regular wages for hours worked within the FLSA's hours maximum. Thus, this decision by no means shuts the door on an employee seeking treble damages under RICO for certain wage claims.

¹ 29 U.S.C. § 207(a)(1).

² 29 U.S.C. § 216(b).

³ 2011 WL 899296 *8, fn 6 (E.D.N.Y. Mar. 16, 2011).

⁴ *Id.*

⁵ *Id.* at *9.

⁶ 208 F.3d 1144 (9th Cir. 2000).

⁷ 2011 WL 899296 at *26, fn. 17.

The Legal Center
One Riverfront Plaza
Newark, NJ 07102
(973) 623-1000



400 Park Avenue
Suite 1420
New York, NY 10022
(212) 432-7419

www.podvey.com

Attorney Advertising: You are receiving this communication because we believe you have an existing business relationship with Podvey Meanor, P.C. or have previously indicated your desire to receive such communications. You may unsubscribe from future messages by e-mailing arainone@podvey.com.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

This publication is designed to provide Podvey Meanor, P.C. clients and contacts with information they can use to more effectively manage their businesses. The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters. Podvey Meanor, P.C. assumes no liability in connection with the use of this publication.

We hereby advise you that prior results do not guarantee a similar outcome. 2011 Podvey Meanor, P.C., One Riverfront Plaza, 8th Floor, Newark, New Jersey 07102, (973) 623-1000 and 400 Park Avenue, Suite 1420, New York, New York 10022, (212) 432-7419.