



A PilieroMazza Update for Federal Contractors and Commercial Businesses

A \$100 Mistake Can Become a \$100,000 Judgment: Where Employers Go Wrong Under the Fair Labor Standards Act

By Matt Feinberg



In recent years, you may have seen or heard advertisements asking a generic question: “are you sure that your boss is paying you correctly?” The increased targeting of employers in the media means that companies, both large and small, are particularly susceptible to unpaid wage or overtime claims under

the FLSA, the federal statute that establishes minimum wage and overtime payment obligations for companies. While the wage and overtime rules seem simple, they are actually quite complex and easy to violate. Plaintiffs’ attorneys are often eager to file unpaid wage claims given that the FLSA includes a fee-shifting provision which allows attorneys to obtain large awards on even the most modest of claims. As a result, more and more FLSA-based lawsuits are being filed in state and federal courts. In fact, the number of FLSA-based suits filed in federal courts has increased annually since 2000, as has the average settlement cost in FLSA cases. The reality is that an employer’s \$100 mistake could turn into a \$100,000 judgment.

So, where do employers go wrong? Although it is not an exhaustive list, the following five mistakes made by employers have contributed to a recent increase in FLSA litigation:

Record Keeping and Record Retention: The single greatest – and by far the most dangerous – pitfall for employers is incomplete record keeping. The employee-friendly nature of the FLSA means employers are penalized if they cannot adequately substantiate the basis for paying an employee a certain amount of money. As a result, even employers who are compliant with the wage

payment requirements of the FLSA could face liability if their record-keeping is not up to snuff. It is, therefore, critical for employers to maintain detailed records of all employee regular and overtime hours worked; all amounts paid to employees; the source of all employee wages (whether it be from hourly wages, tips, bonuses, or commissions); the bases for any non-hourly pay (such as tips), including the method of calculation; and all deductions taken from employee pay. Without detailed records, employers could be facing an uphill battle in any FLSA-based litigation they encounter.

Employee Misclassification: Employee misclassification, a recent priority in the DOL’s compliance and enforcement efforts, is another area where employers often fall victim in FLSA cases. Employers often misinterpret the rules for classifying an employee as exempt from overtime pay or as an independent contractor. Simply paying an employee a salary or issuing an IRS Form 1099 does not mean that the worker is classified correctly and, therefore, not due overtime pay or income tax withholding. On the contrary, it is the scope and nature of the tasks that the worker performs that determines how that worker should be classified. With an adverse ruling, misclassification can result in a large unpaid wage or overtime award from a court as well as the assessment of back taxes, penalties, and interest by the IRS.

Off the Clock Time: One of the trickiest wage payment problems for small- and medium-sized businesses is navigating proper wage payment practices for employees who have “off the clock” time as part of their regular workday or who are pressured not to record their overtime hours at all under an employment or

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government contract. Labor regulations require that employers compensate employees for their time spent performing the worker's "principle" activity or any function integral to that principle activity. The decision about whether a task is or is integral to a principle activity are made on a case-by-case basis. The determination is complicated by the fact that, sometimes, such tasks as changing into a work uniform; loading or unloading a vehicle; or carpooling to a job site, may be compensable hours where other times they may not. A thorough review of pre- and post-workday tasks is important to ensuring FLSA compliance.

Tip Sharing: A growing number of FLSA cases have arisen out of the food and beverage industry. Many of these cases relate to employee claims that a tip pool, where all servers or bartenders share in a joint "pool" of tips from the entire restaurant, was administered incorrectly. Whether a tip pool is properly administered depends on numerous factors, including the identity of the tip pool participants, the job duties of each pool participant, and the amount and type of deductions taken by the restaurant. When the employee-claimant is correct, or where an employer is unable to prove, through detailed records, that the tip pool was administered properly, the entire tip pool may be overturned, creating a large class of plaintiffs, each of whom holds a significant unpaid wage claim. Accordingly, the proper administration of a tip pool is critical to food and beverage companies avoiding FLSA complaints.

Employer Response to Employee Complaints: Perhaps the most avoidable mistake made by employers facing FLSA claims is a negative reaction to an employee's complaints about wage practices. The FLSA contains an anti-retaliation provision which establishes a distinct cause of action against an employer for any adverse employment action (such as termination, suspension, demotion, or ill-treatment) taken against an employee who has complained to a proper person about a potential regular or overtime wage payment problem. Employers must take employee complaints seriously and investigate employment practices where possible in order to protect themselves from potential FLSA complaints.

Ensuring wage payment compliance can be a complicated

and often tedious challenge, sometimes with moving goalposts. As FLSA lawsuits increase, employers should be wary of possible pitfalls at all times so that they are in the best position to defend them when they arise. When it comes to the FLSA, an ounce of prevention is worth a pound of cure.

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