IN PRACTICE

EMPLOYMENT LAW

The Perils of Overtime Exemptions and the Limited Role of the Good-Faith Defense

By Kevin J. O'Connor

In the absence of clear, direct guidance on whether a certain class of employee falls within an exemption to overtime laws, an employer takes a leap of faith in deciding to forgo payment of overtime without seeking written clarification. The New Jersey Appellate Division has rendered an opinion in an area with sparse precedents to guide employers — how to apply the "good-faith defense" in the context of an overtime claim by an auto mechanic, where the employer's practices had been reviewed during two separate New Jersey Department of Labor (DOL) audits. A failure to pay $9,400 in overtime mushroomed to a total liability of $85,733.56 for the employer, where the Appellate Division ruled that the employer could not point to the actions or statements of the DOL auditors as a bar to liability under the "good-faith defense" set forth in N.J.S.A. § 34:11-56a25.2.

The employer in *Wagner v. Blue Sky Classic Cars*, 2012 WL 5381720 (N.J. Super. Ct. App. Div. Nov. 5, 2012), was in the business of restoring, repairing, selling and buying classic and antique cars. It claimed the right to avoid paying its auto mechanics overtime in reliance on a supposed "policy" that mechanics are not entitled to overtime, and, at trial, on the 50 percent sales provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(B)(10)(A), permitting an exemption from overtime where more than 50 percent of an employer's business is generated from the sale of motor vehicles. The employer claimed that its policy of not paying overtime to mechanics had been approved during two separate DOL audits, and that it was immune from liability under the good-faith defense regardless of the fact that its understanding of the law was erroneous.

Blue Sky's overtime practice had been reviewed during a DOL audit in November 2007 and got a green light from the investigator. There were additional employee complaints, and a second audit by DOL in 2008 was conducted. The auditor never concluded in any writing that the employer could safely avoid paying mechanics overtime, but the employer believed it had not violated any laws since it never received word that it owed any overtime to the plaintiff.

The plaintiff filed suit in early 2009 for unpaid overtime under the FLSA and New Jersey statutes, and prevailed at trial. The case turned on whether the employer satisfied the good-faith defense provisions of N.J.S.A. § 34:11-56a25.2 and 29 U.S.C. §259a, which generally are a bar to claims for overtime. N.J.S.A. § 34:11-56a25.2 provides as follows:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under this act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged. Such a defense, if established, shall be a complete bar to the action or proceeding, notwithstanding, that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

The FLSA contains a nearly identical provision. 29 U.S.C. § 259a.

The Appellate Division in *Wagner* first observed that there are few reported New Jersey cases interpreting the provisions of N.J.S.A. § 34:11-56a25.2. The Law Division in *State v. Frech Funeral Home*, 185 N.J. Super. 385 (Law Div. 1982), had applied the statute to exonerate a funeral home operator from misdemeanor charges in municipal court for its failure to pay overtime to a trainee. The operator there successfully argued that it thought the trainee fit within the scope of a regulation exempting certain professionals from overtime.

The only other published decision applying New Jersey's good-faith defense has come from the Third Circuit. *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257 (3d Cir. 1999). Writing for the court in *Keeley*, Judge Becker invalidated a regulation adopted by the New Jersey Commissioner of Labor, which had the practical effect of exempting trucking industry employees from the overtime requirements. (The New Jersey Legislature subsequently enacted a law to effectively reverse the holding in *Keeley* by formally exempting certain trucking employees from overtime, see N.J.S.A. § 34:11-56a4). Judge Becker took a critical view of *Frech* given the scant analysis of the good-faith defense which appears there, and adopted the following test which he believed the New Jersey courts would apply to their statute:

> Although New Jersey caselaw is virtually nonexistent on the requirements of that state's good-faith defense to a failure to pay statutory overtime rates, we believe that the plain text of the good-faith provision, along with our own caselaw on the similar federal good-faith defenses and the detailed federal regulations interpreting those defenses, provide ample guidance in this area. First and foremost, New Jersey's good-faith defense is clearly unavailable when an employer is not relying on one of the enumerated sources in the statute, such as a regulation, practice, or policy of the state labor agency. Further, like the federal good-faith defenses, New Jersey's law requires *good-faith* reliance, and we have held that good faith is absent when the employer fails to investigate a law's requirements, or simply relies on a longstanding practice (of either the employer itself or its industry) of failing to pay overtime or on union acquiescence in such failure. We believe that, in the absence of further guidance from New Jersey's appellate courts, these standards should be used by federal courts evaluating an employer's good-faith claims under New Jersey law.

The holding in *Wagner* therefore represents the first word from the Appellate Division on how to construe the good-faith defense. The court cited with approval the analysis in *Keeley* as to what needs to be proven to meet the defense. The court also cited with approval the District Court's decision in *Henchy v. City of Absecon*, 148 F.Supp. 2d 435 (D.N.J. 2001), and upheld the trial court's holding that there was "no clear demonstration of DOL's policies and enforcement procedures with respect to mechanics."

The *Wagner* court held that the statute would be construed in the same way as the federal statute, to require good-faith reliance on a "written administrative regulation, order, approval or interpretation." Significantly, the court cited the decision in *L&F Distributors v. Cruz*, 941 S.W.2d 274 (Tex. App. 1996), recognizing that an employer "may not invoke the absolute defense of good faith if its reliance is based on a determination by a mere investigator for the [DOL]." In short, an employer may not rely upon the actions of a DOL auditor as a statutory defense to a claim for failure to pay overtime.

Lastly, the Appellate Division in *Wagner* affirmed the trial court's refusal to let one of the DOL investigators testify on the employer's behalf about her understanding of the employer's obligations to pay overtime (she would have testified about her audit, would have explained the lack of any explicit mention in a post-audit report about whether it was appropriate not to pay overtime to mechanics, and would have given her understanding that mechanics were not entitled to overtime). The court ruled that since an employer could only point to a regulation, practice or policy of the state labor agency as a bar to recovery, the testimony of the auditor would be confusing to the jury and irrelevant.

Wagner provides welcome guidance to employers seeking to comply with overtime laws. It offers further proof that employers need to carefully vet their overtime practices and consult with qualified legal counsel to avoid significant liability in this business environment. Even where an audit is conducted by the DOL, the employer must take affirmative, good-faith actions to be sure its practices will withstand judicial scrutiny. ■

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Next Week...
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