Workforce
MANAGEMENT
December 2007

Time Is Big Bucks, Class-Action Wage Lawsuits Show

When an employer is sued for violation of employment practices violations today, the suit likely doesn't allege discrimination or sexual harassment, but rather violations of state and federal wage and hour laws.

The ease with which plaintiffs' attorneys can certify a class or collective action under the federal Fair Labor Standards Act, coupled with worker-friendly state statutes and a lack of accurate time recording and reporting by employers, has resulted in an explosion of class-action overtime lawsuits around the United States in the past several years, labor attorneys say. Allegations of misclassifying employees as exempt from overtime and not paying for off-the-clock work hours continues to result in multi-million-dollar settlements and verdicts against employers. For example, in late October Coral Gables, Florida-based specialty contractor MasTec said it would pay $12.6 million to settle the unpaid overtime claims of current and former service technicians in 10 states around the country.

Because such claims are generally excluded from employment-practices liability insurance policies, employers are left with little protection. As a result, vigilant due diligence of payroll practices and protocols as well as education and training are keys to mitigating exposure, attorneys say.

Under the FLSA, created in 1938 to protect industrial workers from exploitation, employees are guaranteed time-and-a-half pay for hours worked beyond a 40-hour workweek, unless they are salaried and fall into one of three main exempt categories: professional, executive or administrative.

In 2004, the Department of Labor modernized the FLSA by making it easier for employers to determine overtime exemptions and by raising the salary threshold below which workers automatically qualify for overtime pay. Rather than decreasing the number of overtime lawsuits as the Labor Department had hoped, the changes added "a lot more fuel to the fire because people started talking about it more," says Paul Siegel, head of the wage and hour practice at Jackson Lewis in Melville, New York.

In 2005, there were 4,039 federal wage and hour suits filed, 10 percent more than the 3,671 filed in 2004, according to the Administrative Office of the U.S. Courts. In 2006, the number of federal wage and hour cases filed jumped another 4.2 percent to 4,207, and attorneys say the pace is not slowing.

"It's probably the leading exposure right now for employers in the U.S., even more than employment discrimination," says Gerald L. Maatman Jr., a labor attorney with Seyfarth Shaw in Chicago, who estimates that five to seven wage and hour class-action lawsuits are brought every day in Cook County, Illinois.

"We currently have 211 pending class actions we're handling firm-wide, and at least 90 percent of them are wage and hour class actions," said Brian T. McMillan, an attorney with employment law firm Littler Mendelson in San Jose, California. "It's just absolutely incredible the increase in wage and hour class actions that we've seen."

Attorneys say part of the reason for the proliferation of wage and hour suits is that—unlike federal employment discrimination cases, which are difficult to certify as a class under Title VII of the Civil Rights Act—certifying a class is much easier under the FLSA, and legal action can be launched by a single person.

The FLSA "makes it really way too easy to certify a class and lump these matters together where there are so many individualized differences," says Robin Conrad, executive vice president of the National Chamber Litigation Center, who has filed a number of amicus briefs in support of employers in wage and hour lawsuits on behalf of the U.S. Chamber of Commerce. "There seems to be some fundamental unfairness here."

Various worker-friendly state statutes have contributed to the proliferation of wage and hour claims, attorneys say. In California, for example, the state Supreme

The Publisher's sale of this reprint does not constitute or imply any endorsement or sponsorship of any product, service or organization.
Crain Communications 732-723-0569. DO NOT EDIT OR ALTER REPRINTS. REPRODUCTIONS NOT PERMITTED.

© Entire contents copyright by Crain Communications Inc. All rights reserved.

TOP 10 WAGE AND HOUR SETTLEMENTS

The largest wage and hour settlements entered into or paid in 2006, in millions:

1.	$98	Citgroup Global Markets
2.	$89	UBS Financial Services
3.	$87	United Parcel Service
4.	$65	IBM
5.	$42.5	Morgan Stanley
6.	$38	24 Hour Fitness
7.	$37	Merrill Lynch
8.	$27.5	Siebel Systems
9.	$15	Sear Roebuck
10.	$14.9	Electronic Arts

Source: Annual Workplace Class Action Litigation Report 2007 Edition, Seyfarth Sahew

Court ruled unanimously in April that the premiums owed to employees for missed meals and/or rest periods are "wages" subject to a three-year statute of limitations rather than a "penalty" subject to a one-year statute of limitations.

That has resulted in a "dramatic increase" in the number of cases alleging missed meals and rest periods against California employers, McMillan says. "Aggressive plaintiffs' attorneys find it not too difficult to come across employers not keeping accurate records of the meal breaks."

Accurate record keeping is one of several steps employers can take to minimize their exposure to wage and hour claims, experts say. Clear policies and procedures that detail the company's payroll practices and time-reporting obligations are also key, they say.

Employers should also require that employees look at their paychecks and either confirm that their time worked was recorded accurately or be given a toll-free phone number to call if they notice improper deductions or time not paid, Jackson Lewis' Siegel says.

An internal audit of payroll practices is also a smart move, especially when it comes to potentially misclassifying a nonexempt employee, attorneys say.

"One of the biggest areas of liability is employees who are misclassified as exempt rather than nonexempt," McMillan says.

Filed by Sally Roberts of Business Insurance, a sister publication of Workforce Management. To comment, e-mail editors@workforce.com.

© Entire contents copyright by Crain Communications Inc. All rights reserved