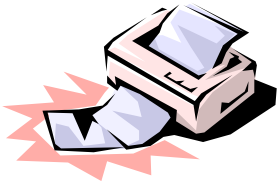


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It's Not Just Wal-Mart They're After! Employers' Wage and Hour Liability Nightmare

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In This Issue

It's Not Just Wal-Mart They're After! Employers' Wage and Hour Liability Nightmare

Plaintiffs' wage and hour lawyers recently obtained a \$6.5 million dollar judgment against Wal-Mart in a Minnesota State Court in Dakota County – and that's before attorneys' fees, punitive damages and a few other goodies are awarded by the jury. Minnesota and Minnesota trial lawyers unfortunately are in the forefront of this area of the law and court filings are growing faster than in other types of lawsuits.

Claims that restroom breaks were denied were highlighted in the press coverage of this case, but most of the damages arose from claims that routine breaks of less than 20 minutes were not paid, that employees worked "off the clock" before and after punching in/out and that "donning and doffing" (putting on and taking off uniforms) and other ancillary activities should have been on paid time. This means that these claims, despite the millions of dollars in claimed damages, are all based on a few minutes here and there, times many employees, times 2 or 3 years.

Most employers, not just Wal-Mart, have compliance issues with federal and state wage and hour laws and they are all targets for plaintiffs' wage and hour attorneys. All employers are subject to archaic state and federal minimum wage, overtime and paid time rules, with very limited exceptions for truly supervisory, executive or professional ("exempt") personnel, and many are also subject to the even more incoherent and ambiguous Davis-Bacon requirements and Minnesota prevailing wage guidelines (recently found unconstitutionally vague by a Minnesota administrative law judge). These laws are virtually unchanged from the 1930s and are very difficult (but not impossible) to synchronize with merit pay, bonus, pay for performance, tip sharing or multiple pay rate systems, and do not allow "comp time" or other employer and employee friendly, flexible solutions to doing the work when you can, must or want to and gaining free time. Trial lawyers, labor unions and other special interest groups resist changes like "comp time," rule simplification and removal of "victimless" violations because they prefer the "ambush" opportunities presented by Wal-Mart style lawsuits to clear rules which everyone can understand.



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But, make no mistake, the current law is a time bomb for most employers, and good intentions are not a defense to non-compliance. In fact, the Department of Labor typically won't even let you offset against claimed wage and hour liability, the amounts you actually paid employees, but didn't have to and wouldn't have if you'd known wage and hour rules applied to them. The wage and hour laws are not "common sensical." If you haven't done so recently, you should have experienced labor and employment law counsel audit your pay practices, job descriptions and policies to make corrections while you can make them in a way that works for your business, and without a bureaucratic gun to your head. Doing so now may help you avoid retroactive liabilities you didn't plan for and can't pass on to your customers. Some of the areas we recommend be reviewed are these:

- ÿ Are your "exempt" (supervisory, "administrative" and professional) employees really exempt?
- ÿ Are you tracking time worked correctly and in a manner you can document and defend?
- ÿ Are your "break" policies and documentation adequate?
- ÿ Are you handling overtime as effectively and inexpensively as you can?
- ÿ Have you explored alternative pay rates for inventory, travel, paperwork, training, on-call and other non-revenue producing work?
- ÿ Are you not paying for "work time" you are obligated to compensate and can you change practices to avoid or minimize such time?
- ÿ Can you alter the method you use to authorize and schedule travel and training to reduce wage and hour claims?
- ÿ Do your job descriptions support exempt status?

Plaintiffs' wage and hour attorneys, unions and Department of Labor investigators are pushing wage and hour claims in agency and court proceedings, often in "collective" actions which can combine the back wage claims of dozens, hundreds or thousands of employees. These claims can add liquidated damages, penalties and attorneys' fees for business-killing liabilities covering 2 or 3 years of business.

No employers can afford not to assess their exposure in this area. Those who think they only use "independent contractors" are not immune either, because such claims will attack independent contractor status and claim these service providers are "really employees," and agreements to waive such claims by independent contractors may not be effective. Tax, workers' and unemployment compensation insurance and benefit, retirement and medical claims can multiply the back wage claim exposure in these cases as well.

Employers in all industries should take immediate steps to review planning for compliance with state and federal Fair Labor Standards Act, prevailing wage, Davis-Bacon and related wage and hour law. Please call the author or any other Seaton, Beck & Peters lawyer at 952-896-1700 if you have any questions about this article or if we can help explain audit procedures you can use.

Mark Your Calendar

The 2008 Minnesota SHRM State Conference will be held in St. Cloud on October 13 and 14. Seaton, Beck & Peters is a corporate sponsor of this event with a booth at the show, as well as presentations by Alec Beck, Greg Peters and Tom Revnew. For more information go to www.mn-shrm.org or contact one of the Seaton, Beck & Peters attorneys listed above.

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