



THE KULLMAN FIRM

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CLIENT E-NEWSLETTER

SPECIAL BULLETIN

WAGE AND HOUR ENFORCEMENT ACTIONS AND PRIVATE COLLECTIVE LITIGATION UNDER THE FLSA HAVE DRAMATICALLY INCREASED: ARE YOU PREPARED?

Over the past several years, enforcement actions by the Wage and Hour Division of the U.S. Department of Labor (“DOL”) have grown substantially. The DOL estimates that 80% of employers are “out of compliance” in some form or another under the Fair Labor Standards Act (“FLSA”). Aside from enforcement actions by the DOL, collective actions by private plaintiffs under the FLSA (which differ from class actions only in that they require class members to opt in rather than opt out) now account for approximately 84% of all class or collective actions filed in United States Courts. To make matters worse, several recent pronouncements by the Wage and Hour Division will only serve to foment further enforcement actions and litigation.

On May 9, 2011, the Wage and Hour Division announced the launch of a new application for smart phones—an electronic time sheet that allows employees to track the hours they work and determine the wages they are owed based upon their base wage. According to the Wage and Hour Division, the new technology is significant because it allows workers to keep their own records “rather than relying on their employers’ records, which could prove invaluable during a wage and hour investigation when the employer has failed to maintain employment records.” While the application is currently compatible only with Apple products such as the iPhone and the iPod, the Wage and Hour Division plans to release similar versions for Android and Blackberry platforms.

The Wage and Hour Division also anticipates further updates that will provide features to keep track of tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest. For employees without an iPhone, the Wage and Hour Division has provided a printable work-hours calendar for employees to keep track of hours worked.

Perhaps even more problematic for employers, however, is the Wage and Hour Division’s recent announcement of its “Bridge to Justice” referral system. According to the Wage and Hour Division, when complainants are informed that the DOL is declining to pursue their individual complaints, the employees will be given a toll-free number to contact the newly created American Bar Association approved attorney referral system. When employees call the toll-free number, they will be given the telephone number for a local Lawyer Referral and Information Service that will provide them with names of qualified private sector attorneys who regularly pursue wage and hour claims. The Wage and Hour Division will also provide complainants with specific information regarding the alleged violations at issue and the DOL’s determination of the amount of back wages owed.

The iPhone application and Bridge to Justice programs further supplement the Wage and Hour Division’s “We Can Help” campaign. As part of that campaign, the Wage and Hour Division announced that it will place a special focus on reaching employees in specific industries such as construction, janitorial services, hotel/motel services, food services and home health care, in which the Wage and Hour Division has determined that employees are the “most vulnerable.” The Wage and Hour Division states that it will advise such employees of the “broad array of services offered by the Department of Labor.”

In the past several years, numerous websites have been launched around the country by plaintiffs' attorneys who are fishing for potential collective actions against employers. These include www.usovertimeattorneys.com, www.employmentlawgroup.com, www.forthethepeople.com, www.classactionconnect.com. The latter website includes instructions to employees to "fill out the form below to see if you qualify to participate in this class action." Common threads throughout these websites identify the primary FLSA issues for which plaintiffs' attorneys are looking. These include:

- Misclassifying a non-exempt worker as exempt;
- Requiring non-exempt employees to work off-the-clock;
- Telling employees they are not entitled to overtime pay for various improper reasons;
- Incorrectly calculating the amount of overtime pay due;
- Giving time off in lieu of overtime pay (e.g., comp time) to private sector workers;
- Employees misclassified as independent contractors; and
- Meal and rest period violations.

In addition to the possibility of back wages owed to a substantial number of similarly situated employees, the FLSA provides for recovery of attorneys' fees on behalf of any successful plaintiff. An award of attorneys' fees could be very substantial, in the six or seven figures, if a collective action is certified. Even in cases on behalf of a single or a few individual plaintiffs, an attorneys' fees award could reach the upper tens of thousands of dollars.

As a result of these new enforcement initiatives by the Wage and Hour Division and private attorneys, all employers should review their pay practices periodically to ensure compliance with the FLSA. If you need assistance in auditing your pay practices, please contact the Kullman Firm attorney with whom you regularly correspond.



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