Human Resource Executive®

EMPLOYMENT LAW

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# Looming Liabilities

## With no real relief in sight for the multitude of wage-hour class actions, how should employers respond?

Statistics show that between 2000 and 2003, the number of multi-plaintiff cases filed under the federal wage-hour law, the Fair Labor Standards Act, rose nearly 70 percent. Through June 1, 2004, an estimated 3,400 FLSA suits were filed in federal courts alone. As plaintiffs find success, there is no sign of this growth abating in 2005.

Rather, approximately 2,000 suits have already been filed in the first six months of 2005. In addition to the private suits, the Department of Labor has embarked on its own campaign against noncompliant employers, collecting more than $196 million in 2004. The DOL reports that one in five employers have been audited at least once under the federal wage-and-hour law, according to a June 2005 article entitled "Is Your Company Due a DOL Audit?" in Payroll Manager's Report. These FLSA statistics are likely just the tip of the iceberg, accounting only for the suits filed in federal court while omitting the massive number of class-action filings in state court, as well as the vast number of settlements that remain unreported.

In order to ensure compliance and minimize liability, employers must focus their attention on both federal and state laws. Most states have laws that are modeled on, but can differ significantly from, the FLSA. Furthermore, while an employer may comply with the federal law, state laws also provide an avenue for recovery against an employer who may be compliant with the FLSA. California, for example, provides unique protections to employees under the state analogue to the federal rules. As a general rule, in states that guarantee more rights, employers should ensure that employees are covered under those more forgiving state laws.

Although the FLSA regulations were amended in 2004, they remain complicated and ambiguous, and lawsuits are being filed seeking to develop pro-plaintiff interpretations under the new regulations.

The plaintiffs' bar routinely files claims seeking procedural advantages or pro-plaintiff forums by presenting only state-law claims filed in federal court. This forum-shopping tactic is coupled with the thought that, generally, overtime claims under the FLSA carry more force when filed as class actions. Under this procedural tactic, plaintiffs are seeking not only back pay but liquidated damages and attorneys' fees, significantly raising the stakes on already high damages and civil penalties calculated per violation.

Two developments—the late 2004 overhaul of the Department of Labor's long-outdated FLSA regulations and the more recent passage of the Class Action Fairness Act—seem to provide employers with an optimistic outlook of facing a substantially lower number of wage-hour class actions. However, a closer look suggests that, while both developments certainly are helpful to employers, neither is a panacea. Instead, careful employers still need to take steps to reduce the risks and ensure their employees are examined under both the federal and state FLSA laws. Failure to safeguard a company invites wage-hour class actions from disgruntled employees or a Department of Labor audit.

## Minimal Fixes

Despite the ambiguities, the Department of Labor's new FLSA regulations represent a significant improvement. Congress' actions and amendments are the first in this field since the original New Deal legislation. For the most part, the 2004 regulations did not alter the basic substantive rules of the FLSA. Instead, they attempted to provide a more precise set of guidelines for employers to follow when classifying employees as exempt or nonexempt from overtime wages. The new regulations provide some guidance for certain wage-hour class actions, particularly those challenging the classification of employees as exempt.

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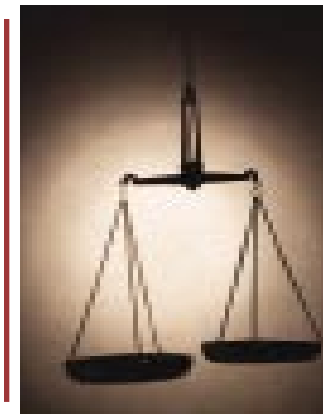

With a few exceptions, however, application of the classification rules still promises to be the main source of FLSA lawsuits, as courts find themselves settling disputes on a case-by-case basis instead of issuing blanket interpretations. Many authorities have noted that the new regulations fail to establish bright-line tests for exemptions, noting a few exceptions, such as employees earning more than $100,000 or assistant managers at retail establishments and restaurants (groups that had been the target for many class-action cases). In any event, these regulations have no impact on state laws.

Moreover, the new regulations fail to address many of the most common types of wage-hour class actions. Some of the most frequent cases do not deal with classification issues at all. For example, employees may allege that nonexempt hourly employees work "off-the-clock." The Department of Labor has made these particular claims an enforcement priority and has collected millions of dollars from employers to compensate for off-the-clock work from employees. For example, it recently reached an agreement with Cingular Wireless to pay $5.1 million to customer-service representatives for unpaid overtime. The new regulations have no impact on these off-the-clock cases, or the similar "donning-and-doffing" safety equipment cases that have caused significant concern in the meat and poultry industries and manufacturing more generally.

Realizing that the new regulations provide only partial relief, employers may have been encouraged by the recent passage of the landmark Class Action Fairness Act. It is not clear, however, if this legislation will impact the rising rates of class actions. As an initial matter, the Class Action Fairness Act does not apply to FLSA cases, since class actions under the FLSA constitute a special breed; namely, opt-in collective actions. The substantive difference is that, in a traditional class action, named plaintiffs represent the entire class that may remain passive but participate—and

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recover—in the suit. This is contrasted by an FLSA collective action, where class members must affirmatively ask the court to join the lawsuit. Interestingly, this opt-in requirement actually was established by a legislative precursor to the Class Action Fairness Act—a buried statute known as the Portal-to-Portal Act that was enacted in 1947 in hopes of curbing a rash of FLSA class actions. Regardless of its source, the special nature of current FLSA class actions proves that the Class Action Fairness Act likely will do nothing to stop the flood of FLSA cases.

While the CAFA does apply to state law wage-hour class actions, it has a somewhat muted impact there as well. The details of the act mean it will only apply to state court wage-hour class actions filed against an out-of-state employer. This should be a relief, in particular, to non-California employers that have frequently found themselves defending suits in the California state courts. These cases may now be routed to the federal courts under appropriate circumstances where broad class actions receive a less friendly reception. Aside from this exception, the act provides no relief for employers sued in their home state.

## Shoring Up

With two possible shields against wage-hour class actions proving to be less than complete, how should human resource professionals respond and help their companies reduce the risk and limit their liability against private suits and Department of Labor inquiries? Due to the intricacies of each company, there is no simple, one-size-fits-all approach to a wage-hour audit. Identifying internal wage-hour compliance issues serves as only the first step in protecting a company. One crucial step in the direction of compliance under the federal laws is to conduct a wage-hour audit flushing out compliance issues. Working with outside or in-house counsel to design and undertake the audit, it may be accomplished in a confidential and privileged fashion.

A second option, though less attractive than an audit, is to obtain a wage-and-hour opinion from the Department of Labor. An employer can send an anonymous letter to the DOL and expect a response as to whether the employee class in question should be classified as exempt or nonexempt. This option is not practical for a companywide response and should only be utilized to classify truly ambiguous groups of employees.

A third and final option may entail waiting for further clarification from Congress or the courts. The danger behind this approach leaves an employer vulnerable to sit as a defendant in a precedent-setting lawsuit that ultimately clarifies the ambiguities of the FLSA for others; this at the expense of a company that failed to take precautions. With no signs that the flood of high-stakes, high-exposure wage-hour class actions is letting up, it is too risky to continue operations without evaluating the workforce.

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