JONES DAY

APRIL 2010

PREPARING FOR INCREASED WAGE AND HOUR LITIGATION AND DOL ENFORCEMENT: A PRIMER FOR TEXAS EMPLOYERS

Whether in the form of civil lawsuits or federal governmental enforcement, Texas employers can expect increased scrutiny of their wage and hour practices in 2010 and beyond. Wage and hour lawsuits have been on a steady rise across the country, including in Texas, over the last decade. During this period, cases filed in Texas federal courts under the Fair Labor Standards Act ("FLSA"), which establishes minimum wage, overtime pay, and recordkeeping standards for employers covered by the Act, increased nearly 400 percent, from 108 cases filed in 2001 to 525 in 2009. This trend is likely to continue. In fact, in 2009, FLSA cases filed in Texas federal courts increased more than 50 percent from the previous year.

Litigation is not the only source of potential challenges to Texas employers' wage and hour practices. With an increased budget and plans to ramp up enforcement, the Department of Labor's Wage and Hour Division, which is responsible for enforcing the FLSA, hired 250 more investigators in 2009, has announced plans to hire more, and is taking steps to focus its resources on enforcement activities. In addition, the DOL recently announced a significant change to its long-standing practice of providing specific guidance to employers on wage and hour compliance issues through the use of Opinion Letters. Rather than providing "definitive opinion letters in response to fact-specific requests submitted by individuals and organizations," the DOL will now issue "Administrator Interpretations" whenever it deems appropriate in an attempt to "clarify the law as

it relates to an entire industry, a category of employees, or to all employees."[1] This change, based in part on the DOL's conclusion that its resources were better used elsewhere, potentially limits Texas employers' ability to obtain clear guidance on important wage and hour issues.

As the scrutiny of wage and hour practices continues to intensify, Texas employers should consider taking action now to reduce risks and ensure compliance. Steps taken in advance of any threat of litigation may prevent, or reduce the impact of, DOL enforcement actions and/or private causes of action for wage and hour violations and are usually far cheaper and less burdensome than those compelled as a condition of settlement or judicial decision. These steps include conducting periodic internal audits as well as employing strategies to effectively review and modify policies and practices regarding employee compensation. Such strategies, as well as the goals of internal audits, are discussed in more detail below.

WAGE AND HOUR LITIGATION

Wage and hour litigation generally involves claims that an employer has failed to properly pay an employee, or a group of employees, all wages due in accordance with federal or state wage and hour laws. While state wage and hour statutes often impose significant requirements on employers, this article focuses on the FLSA, which establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for employees covered by the Act. Although FLSA litigation can involve a variety of claims, two of the most common are misclassification claims—*i.e.*, allegations that an employer has misclassified an employee, or a group of employees, as exempt from the FLSA's overtime requirements—and "off-the-clock" claims—*i.e.*, allegations that an employee, or group of employees, has not been paid for all of the time they worked for the employers.[2]

These and other claims under the FLSA can be brought individually or, as discussed below, on behalf of all "similarly situated" employees and former employees. As a result, FLSA cases can involve a large number of employees and present significant financial exposure for employers. For instance, in *Bahramipour v. Citigroup Global Markets Inc. f/k/a Salomon Smith Barney*,[3] the plaintiffs, who were securities brokers for Salomon Smith Barney, alleged they were improperly classified as exempt under the FLSA. The case was ultimately settled for $98 million.[4]

In addition to the potential for large recoveries, the FLSA's complex statutory and regulatory maze, coupled with some

1 *See* U.S. Dept. of Labor, Wage and Hour Div., Wage and Hour Highlights (March 24, 2010), http://www.dol.gov/whd/Hightlights/archived.htm.

2 In addition to misclassification and off-the-clock claims, other frequently litigated FLSA claims include those regarding alleged overtime calculation errors, *e.g.*, the failure to include certain forms of compensation in the "regular rate of pay," and alleged incorrect classifications as independent contractors.

Moreover, certain FLSA claims are unique to particular industries. FLSA claims brought against hospitality industry employers, for instance, often include allegations that plaintiffs were not paid the applicable minimum wage as a result of tip-sharing or tip-pooling arrangements that do not comply with the FLSA (*e.g.*, section 203(m) of the Act) and/or similar state laws. *See, e.g., Alisa Agofonova et al. v. Nobu Corp. et al.*, Case No. 07-cv-06926 (S.D. N.Y.) ($2.5 million class settlement of case involving alleged improper tip-pool). Plaintiffs in hospitality industry cases also frequently claim that their employers failed to pay them the applicable minimum wage because they allegedly improperly deducted money from employees' paychecks for, or otherwise forced their employees to pay for, their uniforms. *See* U.S. Dep't of Labor, Uniforms and Their Maintenance Under the Fair Labor Standards Act (rev. Mar. 1984); *see also Chao v. M&D, Inc.*, C.A. No. G-05-674, 2007 WL 1168664, at *1 (S.D. Tex. April 18, 2007) (granting summary judgment in favor of plaintiff servers when restaurant employer inappropriately took uniform deductions from servers' paychecks in violation of FLSA). Hospitals and other healthcare entities have also seen an increase in wage and hour litigation. A common claim in these cases is that non-exempt employees' unpaid meal breaks are interrupted or skipped, making them compensable under the FLSA.

3 No. 04-4440 (N.D. Cal. May 24, 2006).

4 *Id.*; *see also Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1285 (11th Cir. 2008) (affirming ultimate award, after a jury trial, of over $35 million in case where plaintiffs successfully showed that they were not exempt from the overtime provisions of the FLSA).

unique characteristics affecting FLSA litigation, create an environment ripe for litigation. Initially enacted in 1938, the FLSA was passed into law when the country's workforce was far different from what it is today. Although amended in some respects over the years, many of the FLSA's requirements and standards were not written with the current workforce in mind. As a result, employers are faced, at times, with trying to apply arguably outdated standards to current fact scenarios in making wage and hour decisions regarding their workforce.

Also, unlike other employment-related claims where the plaintiff carries the ultimate burden of proof to establish liability, employers in FLSA cases must, at times, meet their burden of proof to *avoid* liability. For instance, in a misclassification case, the claimed exemption is in the nature of an affirmative defense. Thus, the employer has the burden of pleading and proving that the employee at issue is properly classified as exempt from the overtime requirements of the FLSA.[5] In other words, if an assistant store manager who has been treated as exempt her entire career files a lawsuit claiming she was misclassified and thus due back overtime wages, the employer, not the employee, has the burden of establishing that the employee was properly classified.

Another unique aspect of the FLSA is its approach to class claims. The FLSA contains its own class action mechanism, under which plaintiffs may sue either individually or on behalf of themselves and others "similarly situated."[6] Because no employee may be made a party plaintiff unless he or she files a written consent to become a party or "opts in," the FLSA provides for a type of "collective proceeding," rather than a traditional class action under Federal Rule 23 or similar state rules.[7]

The FLSA does not provide much guidance to courts regarding how to manage these collective actions. Although differences exist among the courts, they generally follow a two-step approach in managing such cases.[8] Under the first step, a court will "conditionally certify" a class based on an initial showing by the plaintiff that there are other employees "similarly situated."[9] Courts generally employ a "lenient standard in determining whether Plaintiffs have met their burden to show the existence of other similarly situated employees,"[10] although the precise requirements to meet this standard can vary. Once conditionally certified, the plaintiff may provide a court-approved notice to all potential class members, which will generally include information about the case and inform them of their right to join the case by opting in. The second step usually takes place after discovery and involves a determination by the court as to whether the class should be maintained through trial or decertified.[11]

Plaintiffs often use the FLSA's opt-in procedure to their advantage, since it allows them to notify all potential class members about a lawsuit early in the litigation. For example, plaintiffs frequently bring FLSA collective claims under section 216(b) simultaneously with state law class actions based on the same or similar facts under Rule 23 of the Federal Rules of Civil Procedure. Often, at a relatively early stage in the litigation, plaintiffs in these "hybrid" actions move for conditional certification and court-approved notice, arguing that they have met their initial burden under the two-step test described above. Simultaneously, they will attempt to use the potential for a larger opt-out Rule 23 class as a bargaining chip in settlement negotiations. While some courts have found such hybrid actions to be inherently incompatible,[12] others have allowed such actions to

5 *See, e.g., Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991).

6 29 U.S.C. § 216(b).

7 *See id.*

8 *See, e.g., Stiles v. Fee Transp. Servs., Inc.*, C.A. No. 3:09-CV-1535, 2010 WL 935469, *1 (N.D. Tex. March 15, 2010) ("In assessing motions for such 'opt-in' certification under section 216(b), the majority of federal courts employ the two stage approach developed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).").

9 *Id.* (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995), *overruled on other grounds by Desert Palace v. Costa*, 539 U.S. 90 (2003)).

10 *Id.* (citing *Mooney*, 54 F.3d at 1214; *Songer v. Dillon Res., Inc.*, 569 F. Supp.2d 703, 706 (N.D. Tex. 2008)).

11 *Id.* at *2 (citing *Mooney*, 54 F.3d at 1214).

12 *See, e.g., Ramsey v. Ryan Beck & Co., Inc.,* C.A. No. 07-635, 2007 WL 2234567, *4 (E.D. Pa. Aug. 1, 2007))(holding that the state wage-hour opt-out class claims were fundamentally incompatible with the federal wage-hour opt-in claims).

proceed.[13] Notably, the DOL recently filed an amicus brief setting forth its position that such actions "are an essential complement to the Secretary's enforcement of the FLSA."[14]

INCREASING FLSA LITIGATION IN TEXAS

In the last decade, the number of cases involving FLSA claims has increased significantly, from 1,888 cases filed in federal courts in 2000 to 6,144 in 2009.[15] Texas, which is the fourth most popular state for FLSA filings behind Florida, New York, and Alabama,[16] has experienced a similar increase, from 108 FLSA cases filed in 2001 to 525 in 2009.[17] The recent trend of increased FLSA filings in Texas is even more dramatic. In 2007, the number of FLSA cases filed in Texas rose 11 percent, and in 2008 that number increased even more, by 20 percent.[18] And in 2009, the number of cases increased by a remarkable 50 percent, from 349 to 525.[19]

Various factors indicate that this trend is likely to continue. Indeed, Texas has the second-largest workforce in the country, behind only California,[20] is the home of more headquarters of *Fortune* 1,000 companies than any other state,[21] and has a sophisticated plaintiffs' bar, many of whom specialize in labor and employment law and have had significant wage and hour experience in courts throughout the country.[22] Accordingly, it appears that Texas will remain a preferred venue for FLSA litigation for the foreseeable future.

THE DEPARTMENT OF LABOR RAMPS UP ENFORCEMENT ... AND MOVES RESOURCES AWAY FROM PROVIDING GUIDANCE TO EMPLOYERS

The plaintiffs' bar is not alone in focusing on wage and hour issues in Texas. Employers here may also face enhanced scrutiny of their wage and hour practices from the Wage and Hour Division of the Department of Labor ("DOL"), the division of the federal agency responsible for enforcing the FLSA. As Secretary of Labor Hilda Solis announced on her first day on the job, "There's a new sheriff in town."[23] Since then, she and her staff have been implementing changes and new programs as part of the agency's stated intent to increase enforcement of the FLSA. As a result of the $846 million increase in its annual budget in 2010,[24] the agency hired an additional 250 enforcement investigators for field audits in 2009 and plans to add more enforcement investigators in 2010.[25] Other enforcement efforts include DOL campaigns such as the recently announced "We Can Help," with its stated purpose to help the nation's low-wage and vulnerable workers, and programs planned in cities such as Houston to educate employees on their rights under the FLSA and other laws.[26] In addition to these efforts, the DOL

13 *See, e.g., Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 421-25 (D.C. Cir. 2006); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373-74 (S.D.N.Y. 2007).

14 Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 6, *Ervin v. OS Restaurant Servs., Inc.*, No. 09-3029 (7th Cir. Dec. 28, 2009).

15 LexisNexis CourtLink (2010).

16 California also has a high number of wage and hour cases, but many of those are brought under state wage and hour statutes.

17 LexisNexis CourtLink (2010).

18 *Id.*

19 *Id.*

20 *See* http://www.texasonthego.com/tx-facts/texas-snap-shot.html.

21 *See* http://money.cnn.com/magazines/fortune/fortune500/2009/full_list/.

22 Even plaintiffs' lawyers who have not historically practiced in the wage and hour area seem to be bringing more FLSA claims, often in termination cases that traditionally focused on the termination decision – *e.g.*, a case alleging the plaintiff was terminated in violation of Title VII of the Civil Rights Act of 1964, as amended because of his or her sex, race, etc.

23 *See* Kate Thomas, New Sheriff in Town: Labor Secretary Solis Takes Oath of Office (March 16, 2009), http://www.seiu.org/2009/03/new-sheriff-in-town-labor-secretary-solis-takes-oath-of-office.php.

24 *See* Derrick Kain, House Panel Approves $846 Million Increase for DOL Spending for FY 2010, Daily Lab. Rep. (BNA) (July 13, 2009).

25 *See* Hilda Solis, U.S. Sec'y of Labor, Remarks as Prepared for Delivery, We Can Help Kick Off (April 1, 2010), http://www.dol.gov/_sec/media/speeches/20100401_wecanhelp.htm.

26 *See id.*

has stated that it intends to collaborate with worker advocacy groups, such as unions and groups assisting illegal immigrant workers, to increase its ability to enforce wage and hour laws.

While increasing its enforcement activities, the DOL is at the same time reducing resources focused on assisting employers with compliance. On March 24, 2010, the DOL announced changes to its long-standing practice of providing fact-specific Opinion Letters to employers on legal issues involving the FLSA and other statutes.[27] In its announcement, the DOL explained that it no longer considers efficient the use of the agency's resources to provide fact-specific guidance to employers, which was a practice followed for decades.[28] Instead, the DOL intends to focus its resources on making general interpretations of the law that are applicable to "entire industries, groups of employees or potentially to all employees in general."[29] These general interpretations will be called Administrator Interpretations and will be issued "when determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate."[30]

This change in practice has several potentially significant practical consequences to employers. Until now, it was relatively common for an employer to request an Opinion Letter from the Administrator of the DOL's Wage and Hour Division ("Administrator") to seek guidance on a wage and hour issue specific to the employer, such as the proper classification of a particular employee under the FLSA. The Administrator's response to such an inquiry provided the employer with clear guidance on the issue—*e.g.*, the DOL's position on the proper classification of the employee—along with a discussion of the legal principles behind the guidance. An employer's ability to obtain this sort of tailored compliance assistance—an important tool in dealing with the application of an outdated regulatory scheme to current issues—now will be limited.

In addition, the DOL's new approach may affect a defense for employers in wage and hour litigation. Under section 10 of the Portal-to-Portal Act (29 U.S.C. § 259), employers may avoid liability under the FLSA if they can show that a challenged pay practice was designed and administered in good-faith reliance on written guidance from the Administrator. Historically, one form of such guidance was an Opinion Letter. If an employer sought an opinion from the DOL, obtained the opinion, and modified its pay practice to comply within the parameters of the opinion, the employer would be immune from any liability sought by a plaintiff or class of plaintiffs.[31] Now, an employer who seeks guidance from the DOL will not be provided with a specific opinion as to whether they are, or are not, in compliance. Instead, an employer will be provided a recitation of potentially applicable statutes and case law with no application of that law to the specific facts.

While potentially taking away (or limiting the effectiveness of) a mechanism for employers to ensure compliance with, and to utilize in defense of, FLSA claims is a significant change in its own right, it appears the DOL, at the same time, may be trying to increase the success of its own enforcement efforts. Historically, courts have given varying levels of deference to DOL Opinion Letters, with the deference determined in part by the level of analysis contained in the letter at issue. If the first Administrator Interpretation provides any indication as to the form and substance of future pronouncements, it appears that the DOL may attempt to argue that courts should provide more deference to Administrator Interpretations than that generally provided to Opinion Letters. The first Administrator's Interpretation, also issued on March 24, 2010, by Deputy Administrator Nancy J. Leppink (apparently because the Administrator position remains vacant), concludes that "employees who perform the typical job duties of a mortgage loan officer … do not qualify as bona fide administrative employees exempt" under the FLSA.[32] More than eight pages in length, the Interpretation reads almost like an amicus brief. It sets forth the

27 *See* U.S. Dept. of Labor, Wage and Hour Div., Wage and Hour Highlights (March 24, 2010), http://www.dol.gov/whd/Hightlights/archived.htm.

28 *Id.*

29 *Id.*

30 *Id.*

31 29 U.S.C. § 259.

32 *Application of the Administrative Exemption under Section 12(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer*, Administrator Interpretation No. 2010-1 at 1 (March 24, 2010).

"typical job duties" of mortgage loan officers, rejects two previous Opinion Letters, and provides that it represents "a careful analysis of the applicable statutory and regulatory provisions" as well as "a thorough review of the case law."[33] Based on the detail and level of analysis, the DOL is presumably seeking a higher level of deference from the courts with respect to Administrator Interpretations than previously provided to Opinion Letters.

For employers, the nature of the Administrator Interpretation itself creates challenges. Numerous issues that go directly to an employer's liability under the FLSA are inherently fact specific. For instance, whether a particular employee is exempt from the overtime requirements of the Act turns on the particular duties of the employee. Indeed, employees in the same or similar job positions may (and often do) perform different functions. Before the DOL's March 24 announcement, employers could seek guidance from the DOL regarding their specific factual scenarios. Now, however, the DOL will no longer provide concise guidance on the specific facts and instead will provide only the legal principles that may apply as well as, possibly, an Administrator Interpretation that applies generally to "typical" facts surrounding a specific issue. Under the new approach, employers will have what may be a difficult task of applying the DOL's general interpretations, if there is even one that applies, to their unique fact scenarios.

WHAT TEXAS EMPLOYERS CAN DO

With expected increases in both litigation and federal enforcement—and less guidance from the DOL on compliance issues—Texas employers should consider taking steps now to ensure compliance with state and federal wage and hour laws. While a comprehensive explanation of all appropriate steps is necessarily determined, in part, by the characteristics of each employer's business, employers should periodically conduct a self-audit addressing the federal and state wage and hour issues that are applicable to their workplace. Prior to beginning this type of review, consideration should be given to privilege issues attached to the audit, such as the type of work product to generate. The overall goals of such audits, however, should include taking steps:

- to ensure that exempt classifications are properly applied to each individual employee;
- to ensure that exempt employees are paid on a "salary basis," and that absence and leave policies comply with FLSA and state law rules regarding authorized and unauthorized deductions;
- to ensure that all forms of pay required to be included in overtime calculations are, in fact, included;
- to ensure that non-exempt employees are paid for all hours worked;
- to ensure that complete and accurate records are created and kept for the requisite period; and
- to ensure that, to the extent state law requirements exceed those of the FLSA, such stricter requirements become the standard.

Any issues identified in a periodic audit should be addressed promptly. At the same time, specific employment policies and actions should also be implemented to create an environment in which compliance becomes the regular course of business.

The following compliance strategies address some of the more common potential errors in the wage and hour context.

Tips to Avoid Misclassification Errors. To avoid misclassification challenges that threaten exemptions for an individual employee and/or an entire job category, consider the following actions:

- At the time of hiring, inform employees of their employment status (*i.e.*, salaried exempt or non-salaried non-exempt), review the requirements of the job—including a review of the job description for the position—and describe the terms of their payment, for straight time and overtime, in writing.
- Periodically review duties actually performed by exempt employees after they are hired to ensure they remain properly classified.
- Review any policies regarding docking of exempt employees' pay. Such docking may occur only under limited circumstances, which are set forth in detailed regulations.
- Implement a safe harbor policy—*i.e.*, reimburse employees as soon as possible for inadvertent mistaken wage deductions. The FLSA provides the employer a window

33 *Id.*

of opportunity to remedy the situation without encountering liability. The quicker the employer remedies the situation, the less likely it is to find itself facing a lawsuit or an enforcement action.

- If a possible classification mistake is identified, and an employee who is treated as exempt should arguably be non-exempt, consult with counsel to determine the appropriate remedial action, such as a change in status from exempt to non-exempt and making payments to such employee.

Tips to Avoid Overtime Calculation Errors and Off-the-Clock Claims. To ensure that overtime pay is correct and that regular rate of pay calculations include all appropriate forms of compensation, consider the following actions:

- Adopt clear written policies concerning work schedules and hours of work and require approval for hours worked beyond the established schedules.
- Adopt clear written policies that provide that employees are responsible for accurately reporting all time worked and that employees will be paid for all time worked, without exception.
- Train employees and managers regarding timekeeping policies and enforce disciplinary procedures for violations of such policies.
- Instruct supervisors not to pressure employees to meet deadlines or perform other assignments that can only be met by working off-the-clock. Workload expectations should be realistic.
- Regularly review overtime records. If the review reveals that overtime inadvertently was not paid, pay it immediately, even if the hours were not authorized. However, employees working without authorization may be disciplined.
- Bonuses provided to non-exempt employees that are tied to hours worked or performance should be included in regular rate of pay calculations. While bonuses that are discretionary both as to whether they are to be paid and the amount of any payment may be excluded from the regular rate, employers should consult with counsel to determine whether any bonus payments meet this "discretionary" exception. Alternatively, employers may accurately tie bonuses paid to non-exempt employees to a percentage of both straight-time and overtime earnings.
- Carefully consider the requirements for "extra compensation" and premium payments from 29 U.S.C. §§ 207(e)(5)-(7), and understand that a mere shift differential must be included in the regular rate.

Tips to Avoid Meal and Break Rule Errors. To stay clear of challenges under meal and break rules, consider the following actions:

- Implement clear and affirmative written policies regarding meal and break times of non-exempt employees and require approval for additional hours worked.
- Implement measures to ensure that any unpaid breaks are uninterrupted and employees taking such breaks are completely relieved from duty.
- Instruct supervisors that they cannot assign tasks to non-exempt employees or allow such employees to perform work on a recurring basis during such unpaid periods of time.

Tips to Avoid Recordkeeping Errors. To ensure accurate recording of hours employees actually work and the proper preservation of such records, consider the following actions:

- Where appropriate, install a timekeeping procedure and implement a written policy regarding its use. The policy should require non-exempt employees to make a notation immediately upon arrival at work and at their departure, as well as during all lunch or personal breaks. Administer consistent discipline for failures to use such procedures.
- Require that exempt and non-exempt employees complete time sheets on a weekly basis.
- Require non-exempt employees to review and sign their time cards or time sheets every week and to initial any changes made to them. These steps will ensure that time records are accurate and will provide critical pro-employer evidence in the event of an off-the-clock claim.
- Retain clear and accurate time and payroll records for all employees—exempt and non-exempt. This step will ensure that there is a mechanism in place not only to maintain accurate records, but also to correct any mistakes that may be made and to provide an avenue for employees to complain if they believe they have not been treated fairly with respect to their pay. Furthermore, accurate records will be important to defense of any off-the-clock claim.

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