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Three Critical Steps Employers Can Take to Reduce Wage-and-Hour Liability

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A record-high 7,064 Fair Labor Standards Act (FLSA) suits were filed in federal court during the year-long period ending March 31, 2012, according to figures from the Federal Judicial Center. This follows the decade-long trend of continued increase in wage-and-hour litigation at both the federal and state level. Although the FLSA lags in appropriately meeting the realities of today's workforce and economy, employers looking for proactive approaches to reduce the potential for these costly lawsuits can find solace in recent federal court decisions, which provide guidance as to steps employers can take.

Step 1: Establish a Solid and Reasonable Complaint Procedure

In *White v Baptist Memorial Health Care Corp.*, the U.S. Court of Appeals for the Sixth Circuit followed the lead of the Eighth and Ninth Circuits when it rejected claims brought by a former nurse seeking unpaid wages for missed and unpaid meal breaks.

Under the hospital's policy, employees working shifts of six or more hours receive an unpaid meal break that was automatically deducted from their paychecks. However, the policy also advised employees to report missed or interrupted meal breaks so that the hospital could properly compensate the employee for the additional time worked. Although White occasionally complained to her supervisors that she never received a lunch break, she never told her supervisors or the human resource department that she was not compensated for those missed meal breaks.

The Sixth Circuit held that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." In so ruling, the court rejected White's argument that the hospital should have known about the unpaid time because of her complaints to her supervisors. According to the Sixth Circuit, "When an employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA."

What Steps Should Employers Take?

Companies doing business within the Sixth, Eighth and Ninth Circuits, and elsewhere, should review their pay policies to ensure they have a reasonable reporting procedure in place for employees to report unpaid time worked and to report any failure to receive their proper compensation. Such a procedure should also provide a mechanism for investigating and remedying meritorious claims. Asking employees to acknowledge reporting policies will help protect against claims for unpaid working time.

Step 2: Establish a Policy and Procedure to Document and Investigate Oral Complaints

In a case that has led to an uptick of FLSA retaliation lawsuits by employees, on March 22, 2011, the United States Supreme Court held that the FLSA's anti-retaliation provision protects employees who file oral complaints. In *Kasten v Saint-Gobain Performance Plastics Corp.*, an employee alleged that he was discharged after he orally complained to company officials that the placement of time clocks violated the FLSA because it prevented workers from receiving credit for time spent donning and doffing required protective gear and walking to work areas.

The FLSA's anti-retaliation provision forbids an employer from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint…." The district court dismissed the case after concluding that the FLSA did not cover oral complaints.

Reversing the dismissal, the Supreme Court broadly interpreted the phrase "filed any complaint" to include both oral and written complaints. The Court acknowledged, however, that this language "contemplates some degree of formality" and requires that the employer receive "fair notice that a grievance has been lodged." The Court further explained that complaints protected by the FLSA's anti-retaliation provision "must be sufficiently clear and detailed for a reasonable employer to understand it." Notwithstanding its broad interpretation of the phrase "filed any complaint," the Court declined to address whether the statute protects complaints to private employers, as opposed to government agencies. Nevertheless, a majority of the courts to address this issue, including the Sixth and Seventh Circuits, have concluded that the FLSA protects informal complaints to employers.

What Steps Should Employers Take?

Recent Supreme Court decisions have broadly interpreted the anti-retaliation provisions contained in federal employment statutes. The *Kasten* decision continues this trend. Therefore, employers must carefully evaluate any personnel actions that will affect employees who have previously complained (either orally or in writing) of violations of wage-and-hour or anti-discrimination statutes. Perhaps even more importantly, employers should establish a procedure for documenting and responding to oral complaints in conjunction with training frontline supervisors in how to distinguish complaints under Kasten versus typical employee gripes.

Step 3: Establish a Policy Regarding Non-exempt Employees' Remote Access and Virtual Workspaces

In *Lewis v Keiser Sch.*, the United States District Court for the Southern District of Florida held that e-mails sent during lunch did not constitute "work" because they "were not lengthy and could not have taken more than a few minutes to draft and send." The court also ruled that Lewis herself had created the record of being at lunch by checking out of work (and thus not working). Further, the fact that certain managers might have received those e-mails during her lunch hour did not demonstrate that the employer understood her to be performing work off the clock, i.e., that it suffered or permitted her to work, the court held.

Lewis follows favorable decisions from other district courts defeating claims brought by non-exempt employees alleging off-the-clock work based on their access to or minimal usage of electronic communication systems, whether e-mail, text message or otherwise. However, in each case the employer had solid policies in place and the use of remote access or smartphones was limited.

What Steps Should Employers Take?

Companies should consider adopting a policy prohibiting non-exempt employees from performing work outside of working hours and specifically prohibiting the use of remote access or smartphones for work outside of normal working hours. Employers should also train management employees to take appropriate action when non-exempt employees fail to comply with this policy. Other steps employers could take to limit potential liability for compensable off-the-clock work are limiting the hours during which remote access is accessible or limiting remote access to exempt employees only. Training supervisory and management level employees to understand that they should not send non-exempt

employees e-mail or text messages after hours or ensure that the message is clear that the employee should not respond until the next working day.