CHAIN STORE AGE
CSA

Overtime Pay - Claims by Store Managers and Assistant Managers on the Rise

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Retailers are facing a growing onslaught of lawsuits from current and former managers and assistant managers who are claiming their employers should have paid them for overtime under the Fair Labor Standards Act (FLSA). The managers assert that much of the work managers and assistant managers do is not truly managerial and, therefore under the FLSA, they should not be exempt from receiving overtime pay for any time worked over 40 hours in a given week. By and large, the managers have been successful in these suits because many of their duties also included such manual labor as stocking shelves, cashier work, cleaning up spills, etc.

The FLSA establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards. It mandates that employers:

- Cannot pay employees an amount below the statutory minimum wage; and
- Must pay most employees working more than 40 hours per week overtime at a rate of one and one-half the employees' regular rate for any excess hours worked.

Employees not covered by FLSA's overtime requirements fall into one of the "exempt" classifications under federal or state law. Employers should act with caution in categorizing employees as "exempt" or "non-exempt." To qualify as an employee "exempt" from FLSA's overtime requirements, an employee must meet a salary basis test and a job duties test, the specifics of which vary depending on the type of exemption being claimed. These include:

- executive (managerial) exemption;
- administrative exemption;
- professional exemption;
- highly compensated employee exemption; or
- outside salesperson exemption.

To qualify as an exempt executive, or managerial employee, the employee must:

- Manage other workers as a primary job duty;
- Direct the work of two or more full-time employees;
- Have authority to hire, fire, discipline, promote, and demote others or make recommendations about these decisions;
- Earn a salary of at least $455.00 per week (more in some states).

An administrative employee generally must:

- Primarily perform office or non-manual work directly for company management or administration;
- Primarily use his or her own discretion and judgment in work duties;
- Earn a salary of at least $455.00 per week (more in some states).

This summer, managers of Papa Gino's, an Italian restaurant chain in New England, brought a class action for overtime violations. The named plaintiffs, who held titles of assistant manager, manager in training, and general manager, performed the same mostly non-exempt, non-managerial work that hourly employees also performed. Their duties included answering the phone, taking and preparing food orders, working at the grill and cash register, and cleaning. If successful, the plaintiffs would be entitled to back pay, statutory liquidated damages, and attorneys' fees.

The Papa Gino's case is typical of the cases being brought against retailers throughout the country. Frequently, managers of retail establishments are not paid overtime, yet are required to perform the duties of hourly workers. An employer found liable under the FLSA must pay back pay, plus liquidated damages, consisting of 100% of the back pay award, and attorney fees. Some states, like New York, add additional liquidated damages to the award under state law. Considering that such claims may be brought as a class action containing numerous plaintiffs, the potential damage awards are enormous.

The number of costly FLSA lawsuits and settlements paid by retailers is growing. Recently, TD Bank agreed to settle an action for $9.9 million for failure to pay its assistant managers overtime wages. Actions have been brought against Dunham's Sports; a Michigan-based chain, and the National Cracker Barrel restaurant chain for failure to pay assistant managers overtime. In both instances, the assistant managers claimed that they spent a majority of their time performing non-managerial duties.

Many other retailers also reported to be dealing with overtime pay claims. Overtime pay for retail store managers and assistant managers is an area of tremendous exposure for the retail employer.

Managers and assistant managers at most retail chains perform the duties and assume the responsibilities of management. But at times, their employers also need them to step in to supplement the manual labor performed by hourly workers. If a significant amount of the manager's time is spent handling matters that are not managerial in nature, overtime benefits will have to be paid to that manager under the FLSA.

In March, President Obama directed the Department of Labor (DOL) to issue new regulations under the FLSA, narrowing the exemptions to overtime pay. President Obama did not specify the changes he wanted the DOL to make, but they are likely to be in three areas:

1. The minimum salary requirement for exempt employees will probably be increased from the current $455.00 per week minimum, which would mean that lower wage exempt employees will be entitled to overtime pay.

2. The DOL will require some minimum regular rate of pay for all hours worked by exempt employees.

3. Development of a more specific definition of what duties are outside exempt employees' responsibilities (i.e. stacking shelves).

Some of the regulations will likely focus on chains and retailers, with the intent of forcing them to pay managers and assistant managers overtime pay if their responsibilities do not meet the tougher standards set for exempt managerial employees. The proposed regulations have not yet been released, but will be available for public comment before the regulations are finalized. Stay tuned.

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