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PUBLIC AGENCY RISK MANAGERS ASSOCIATION (PARMA) 2017 ANNUAL CONFERENCE

Litigating an FLSA Case

2/15/2017

PRESENTED BY:

Elizabeth Tom Arce

Litigating an FLSA Case

Public Agency Risk Managers Association (PARMA) Annual Conference


Presented by: Elizabeth Tom Arce | February 15, 2017

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Litigating an FLSA Case

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Agenda

- Preventing the lawsuit
- Analyze the allegations
- Good faith/willfulness defense
- Stop the bleeding!
- Prepare for litigation
- FLSA settlement

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Preventing Lawsuits

- Audits
 - Payroll practices
 - Regular rate calculations
 - Cafeteria plans (*Flores* considerations)
 - Employee classifications
 - Hours worked
 - Work schedules
 - Job descriptions
- Work with payroll vendor

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Analyze the Allegations

- What type of FLSA lawsuit is this?
- Types of FLSA lawsuits
 - Off-the-Clock
 - Regular rate of pay
 - Misclassification
- Statute of Limitations is 2 or 3 years
- Single plaintiff or collective action

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What is an Off-the-Clock Action?

- Plaintiffs allege that they were not compensated for all hours worked “suffered or permitted” by the employer
 - Activities that benefit the employer even if not required or requested
 - Employer knows or should have known employee works overtime

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Typical Allegations in Off-the-Clock Actions

- Employees are told they are not authorized to work overtime, but still do in order to “keep up”
- Employees regularly come in early and/or stay late to perform work duties
- Employees work through their unpaid lunch and/or rest break
- Employees are reading and responding to emails after hours

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Misclassification Actions

- Employees who fall within one of the “white collar” exemptions are not subject to the FLSA’s overtime rules
 - Executive
 - Administrative
 - Professional
 - Highly compensated employee
 - Computer software

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Typical Allegations in Misclassification Actions

- Employees claim they were misclassified as exempt
 - Should have been classified as non-exempt because the primary duties of their position do not satisfy the test for the executive, administrative or professional exemptions
- Employees seek overtime pay for work performed in excess of 40 hours per work week

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Regular Rate of Pay Actions

- The FLSA requires that an employee who works overtime must be compensated for those overtime hours at a rate of at least one and one-half times the employee’s “regular rate” of pay
- The regular rate includes “all remuneration for employment paid to, or on behalf of, the employee” unless specifically excluded under the FLSA

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Common Errors In Calculating Regular Rate of Pay

- Payments not properly included
 - Bilingual pay, shooting pay, standby pay, etc
- Payments not properly excluded
 - Certain types of holiday pay, discretionary bonuses, vacation pay
- Failure to apply special exemptions
 - Public safety section 207(k) exemption

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Flores v. City of San Gabriel

- The decision applies to all employers who pay **FLSA overtime** and provide cash as part of a benefit plan/program
- Decision includes three primary holdings
- Holding # 1: Cash payment must be included in the regular rate of pay

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Flores v. City of San Gabriel

- Holding # 2: Total value of employer contribution to the plan **may** need to be included in the regular rate if the plan is not bona fide, even when portions of the benefit allowance are paid to a 3rd party
- Holding # 3: Willfulness and good faith defenses were rejected

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Willful Violations of the FLSA

- Plaintiffs have the burden of proving a “willful” violation of the FLSA
- If violation is found to be willful, the statute of limitations is three years rather than two years
- Affirmative steps by agency can avoid willful violations

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Good Faith Defense

- Employer may establish good faith defense by establishing that it subjectively intended to ascertain and follow the FLSA and had reasonable grounds for believing it complied with the FLSA
- Examples
 - Audit
 - Email correspondence

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Stop the Bleeding!

- At the outset of the lawsuit, take steps to prevent ongoing of liability
- If any policies or practices are non-compliant, need to make fixes
- If settle or resolve lawsuit through litigation, but no fixes, problem still exists and employer subject to future claims

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Stop the Bleeding!

- Examples:
 - Issue and implement a strong overtime policy.
 - Strong overtime policy = Legal defense
 - Must discipline employees for violations of overtime policy.
 - Duty of management
 - Need to train and document violations of policy
 - Will not be liable for off-the-clock work if employees intentionally hide the work

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Stop the Bleeding!

- Examples:
 - Record actual time worked by employees.
 - Track all hours worked even if for 1/10 of an hour.
 - Stagger work shifts to avoid pre and post shift activities.
 - Audit payroll system to ensure wages are correctly calculated (FLSA vs. non-FLSA OT).

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Stop the Bleeding!

- Meet and confer with unions
 - Overtime rules cannot be adopted, modified or changed without first exhausting the statutory meet and confer process
- Impact on labor negotiations
- Negotiations over MOU language regarding wages
- Example – contract overtime

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Preparing for Litigation

- Assemble the agency's team
- Assemble key witnesses
- Assemble key documents

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Key Documents

- Payroll records *i.e.*, pay stubs, time sheets that show hours worked
- Payroll manuals or documents that show how the payroll system calculates wages
- MOUs including note from negotiations
- Personnel rules, policies or resolutions
- Special exemption documents

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Key Documents

- Any other documents evidencing pay, *i.e.*, bonus plans, commission plans
- Job descriptions
- Prior exemption analysis or audits

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FLSA Settlement

- There are only two ways to settle FLSA claims:
 - DOL supervised settlement.
 - Judicial approval of a settlement.

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FLSA Settlement

- Once back overtime calculation is completed, develop recommendation for settlement authority with agency staff for presentation to governing body to receive settlement authority
- Consider use of third party mediator for settlement negotiations

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FLSA Settlement

- If settlement negotiations are successful, draft agreement to maximize enforceability of agreement
- Cannot waive future liability
 - Make sure the release language is not overbroad

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FLSA Settlement

- Key elements of settlement agreement:
 - Describe legal representative involvement and approval of settlement terms.
 - Characterize settlement as resolving a bona fide dispute over the amount of overtime owed.
 - Include explicit waiver of liquidated damages.
 - Itemize overtime to be paid to individual claimants.
 - Individual compromise and release signed by each claimant.

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Prevention Tips

- Consistently enforce overtime policy
- Train supervisors and managers on overtime policy and FLSA
- Audit work schedules, and time keeping and payroll policies and practices
- Audit job descriptions
- Conduct FLSA audit

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Thank You

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