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Employment & Labor Law Advisory
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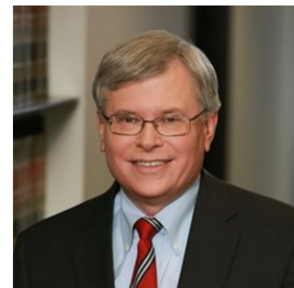
Recent Arizona Case Highlights Risk of Personal Liability for Owners, Managers on FLSA Claims



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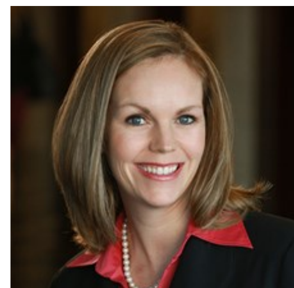

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As most business owners and managers know, the federal Fair Labor Standards Act requires all covered employers to pay overtime compensation to any non-exempt employee who works more than 40 hours in a week. A recent Arizona case illustrates the risk of personal liability for owners and managers on FLSA claims.

FLSA personal liability

Most employment laws only apply to the specific legal entity for whom the employee works (corporation, limited liability company, or similar entity). Under the FLSA, however, "any person acting directly or indirectly in the interest of the employer" also can be individually responsible for the employer's overtime violations.

Courts typically consider four factors in assessing potential individual liability; courts look at whether the individual: (1) has the authority to hire and fire employees; (2) determines the rate and method of payment; (3) supervises and controls work schedules or conditions of employment; and (4) maintains employment records. No one factor is dispositive; courts consider the "circumstances of the whole activity" in assessing whether the individual can be said to be "acting directly or indirectly in the interest of the employer."

Arizona case

The federal district court in Arizona recently addressed this issue in a case filed by the U.S. Department of Labor against a local building contractor. The DOL claimed that the contractor failed to pay overtime and keep appropriate records in violation of the FLSA. The DOL also sought to hold the contractor's president personally responsible for those violations.

The contractor's president asked the court to dismiss him from the case, asserting that he was not the workers' "employer" under the FLSA. But the court denied that request, and ruled that the president could indeed be personally liable.

The court noted that although the president had designated many of the day-to-day operations to other supervisors, he nevertheless maintained authority over many management functions. He had the authority to hire and fire employees, as well as the authority to set employees' pay rates. He also had the authority to make decisions about the method of payment of employees (cash or check), and about employee

benefits. The president argued that he actually had not exercised his authority over such matters in many years. But the court pointed out that the pertinent question was whether he possessed the authority, not whether he actually exercised it.

The court also noted that the president held a significant ownership interest in the company. And although he was not a majority owner, he was the only owner who was active in the management of the business. Those facts buttressed the court's conclusion that he had the requisite authority to be personally liable for FLSA violations.

The evidence indicated that the president also had at least some involvement in maintaining employment records. Although the company's HR and payroll staff had the primary responsibility for the maintenance of such records, the fact that the president was involved at all was a factor in determining that he could be responsible under the FLSA.

The court also considered the issue of employee scheduling. The president claimed that the pertinent employees (who worked in the field) actually determined their own schedules. The court concluded that the evidence was in dispute, but since no one factor is dispositive, the issue did not alter the court's conclusion on the basis of all factors that the president could be personally liable.

Recommendations

The recent Arizona case reflects a growing trend among plaintiffs' attorneys to sue companies and individual owners and supervisors for claimed FLSA violations. As the case indicates, the legal principles authorize such claims, and create risk for individuals.

The only practical way for an owner or manager to eliminate that risk, of course, is to ensure that the company itself is in compliance with the minimum wage and overtime obligations of the statute. That means making sure that the company properly records all "hours worked" by non-exempt employees, and that it properly pays all such employees at no less than the minimum wage and for any overtime that they work in any given week. Individual owners, supervisors, and managers who possess or exercise the kind of authority that the court discussed in the recent case are well-advised to be sure that their companies are complying with those obligations. Gallagher & Kennedy's attorneys routinely work with clients to assist with internal audits on FLSA compliance.

More and more employers also are taking advantage of recent Supreme Court decisions enforcing agreements to submit FLSA claims to binding arbitration, which can be a far quicker, less expensive, and more reliable process than civil litigation for the resolution of all types of employment disputes, including FLSA claims. Properly worded arbitration agreements also can avoid "class action" FLSA claims. Employers who do not presently utilize arbitration agreements with their employees should strongly consider doing so. Gallagher & Kennedy's attorneys regularly work with business clients to draft, implement, and enforce such arbitration agreements.

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We encourage employers who have specific questions about potential FLSA liability (or any employment law topics) to contact any of the members of Gallagher & Kennedy's Employment & Labor Law practice.