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TITLE: FLSA: WAL-MART/DOL PACT MAY PROMPT MORE CLAIMS INVOLVING OVERTIME CALCULATION, ATTORNEYS SAY

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TEXT:
The recent Labor Department settlement with Wal-Mart Stores Inc. over calculating overtime when bonuses and premium payments are involved should serve as a warning to other employers about similar problems, a panel of attorneys said Feb. 7.

Speaking during a teleconference sponsored by the American Bar Association, the attorneys also said that classifying white-collar employees -- such as securities brokers and computer employees -- under the Fair Labor Standards Act continues to be problematic given disagreements between how the courts and the Labor Department have interpreted the exemptions.

Tammy McCutchen, the former head of DOL's Wage and Hour Division, said disputes over calculating overtime when differentials are added to the base wages could become a growth area in litigation as more plaintiffs' attorneys uncover potentially large amounts of miscalculations.

"I don't think the claims are a huge source of litigation right now," said McCutchen, of Dickstein Shapiro in Washington, D.C., "but I think the regular rate cases are something employers need to pay attention to. The plaintiffs bar will become interested in the cases and then employers need to be prepared."

'Regular Rate' Disputes.

The attorneys were discussing the January settlement between the Labor Department and Wal-Mart, in which the company agreed to pay over $ 33 million to settle allegations it failed to include nondiscretionary premiums and bonuses into the calculation of overtime (17 DLR AA-1, 1/26/07).

Plaintiffs' attorney Gregory K. McGillivary said that he is seeing more and more cases involving "regular rate" disputes, especially in unionized settings, because the proliferation of bonuses and differentials have not been considered when calculating the "regular rate" that becomes the basis for overtime compensation.

"When people receive specific differentials for safety and productivity, for instance, the regular rate needs to be pro-rated for the periods that are covered," said McGillivary, of Woodley & McGillivary in Washington, D.C. "The truth is lots of employers don't do that."

While McGillivary said it was unlikely that the Wal-Mart lawsuit would set off class actions based solely on the issue of computing regular rates, he said the issue is one attorneys for plaintiffs can use easily in claims involving other issues because the lawsuits really just involve analyzing the

pay data obtained through electronic discovery and doing mathematical computations.

Classification of White-Collar Workers.

Another area that continues to challenge employers -- and serve as a profitable area of litigation for plaintiffs' attorneys -- is the classification of highly paid, white-collar employees, said Susan N. Eisenberg of Akerman Senterfitt in Miami.

Eisenberg pointed to a series of lawsuits brought on behalf of stockbrokers and other financial services industry employees as an example of the disputes that are occurring over classification. These settlements include a $ 98 million settlement with Smith Barney employees (101 DLR AA-1, 5/25/06), as well as a $ 37 million settlement with Merrill Lynch (154 DLR AA-1, 8/11/05) an $ 89 million deal with UBS (28 DLR AA-1, 2/10/06), and a $ 42.5 million deal with Morgan Stanley (43 DLR AA-1, 3/6/06).

The lawyer responsible for those lawsuits, Mark Thierman, said during the teleconference that the lawsuits have arisen because the employees are incorrectly classified as exempt from overtime because they were primarily hired to sell securities and therefore do not qualify for the administrative exemption under federal or state wage laws.

Thierman, of the Thierman Law Firm in Reno, Nev., said that the workers are paid entirely on commissions and that they do not receive the guaranteed salary required under the FLSA.

McCutchen challenged Thierman over the theory that the employees do not receive a salary, suggesting that the language in the FLSA about a "minimum guarantee" would appear to suggest that the brokers are paid a salary even if they do not make enough in commissions.

But Thierman said that such arrangements are "window-dressing" and that the "draw" a broker receives is really just a loan and not an actual salary.

Eisenberg suggested that a recent DOL opinion letter on the financial services industry that said many employees are exempt (237 DLR A-1, 12/11/06) may have changed the landscape of financial services lawsuits, but Thierman said the opinion letter was unconvincing.

"What the opinion letter says is that we have a jury question," said Thierman. "I dislike the opinion letter and I believe it runs contrary to the decisions of a federal judge in California."

Disputes Over Computer Employees.

There was generally more agreement among the attorneys on the question of computer employees. All of the attorneys agreed that significant problems exist with the classification of computer employees and many employees currently considered exempt are actually owed overtime.

"This is one of my real pet peeves," said McCutchen, who helped craft the 2004 changes to the overtime regulations when she headed DOL's Wage and Hour Division. "How many times does the Department of Labor have to tell you help-desk employees are not exempt?"

McGillivary and Thierman explained that the disputes arise because help-desk employees who provide services to computer users should not be classified as exempt because their work does not involve discretion and decisionmaking.

Employers make mistakes, McGillivary suggested, when they give employees a title like "program analyst" when in fact the employee is merely performing help-desk functions. Regardless of the title, the employee should still be nonexempt under the FLSA, he explained.

McCutchen said DOL is "constrained by the statute" and is unlikely to make changes to the computer employees exemption, which means that computer employees who are not doing

advanced work should not be considered exempt.

Where there is disagreement between plaintiffs and management attorneys, McCutchen said, is over the classification of programmers. McCutchen argued that some programmers who are making decisions based on multiple options could be considered exempt in some situations, but Thierman said it was the rare programmer that would qualify for the exemption.

"They are applying technical skills and rarely have any discretion," Thierman said of computer programmers. "The decisions are made for them."

Supreme Court to Take on DOL Deference.

In addition to discussing exemptions and pay calculations, the attorneys previewed an upcoming case before the Supreme Court that raises significant questions about the amount of deference owed Labor Department guidance, such as opinion letters.

The case, Eisenberg explained, is Long Island Care at Home Ltd. v. Coke which involves a dispute over the level of deference owed to Labor Department opinion letters and guidance when interpretations appear to be shifting (4 DLR AA-1, 1/8/07).

"It will be very troublesome to employers if the court says opinion letters are owed less deference," said McCutchen. "I'm very worried about how the Supreme Court will come out."

McCutchen said that employers rely on the information provided by the Labor Department through opinion letters and therefore are placed in a bind when they have relied on information that is later rejected by a court.

"It is very difficult and unfair," McCutchen said. "The judge doesn't agree with the Labor Department and suddenly I am liable?"

But Thierman countered that employees should not be denied overtime just because the Labor Department got the issue wrong in the first place. Relying on information that is later rejected by the courts hurts employees if it means the employees have been denied overtime, he suggested.

McCutchen said that maybe a "safe harbor" provision should be added to the FLSA that protects employers who rely to their detriment on DOL guidance. She pointed out that employers generally are unable to use a good faith affirmative defense when they have relied on DOL guidance but were later found liable for violations by a federal court.

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