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Working on Overtime

Big class actions are fueling efforts to rewrite federal salary rules

Krysten Crawford Corporate Counsel 12-17-2002

As a onetime union buster, Mark Thierman used to get death threats and was once chased down the freeway by labor toughs. So why, then, is the former corporate henchman now fashioning himself as a white knight to the workaday Joes he once battled? The answer: there's big money in wage-and-hour rules. Lawsuits accusing employers of cheating workers out of overtime have proliferated in recent years, and Thierman has emerged as a major player. "These [cases] are going to spread like crazy," the Reno, Nev., solo practitioner warns, "and I'm one of the guys who's going to do it."

Not if people like Tammy McCutchen can help it. McCutchen, a former in-house lawyer who is now a top official at the U.S. Department of Labor, hopes to slow the stampede to the courthouse. She wants to rewrite the federal rules that many employers use to determine which workers are ineligible for overtime pay. It's an ambitious undertaking and one that's been attempted, unsuccessfully, by every administration since Jimmy Carter's.

But McCutchen, with the full backing of her bosses, Labor Secretary Elaine Chao and Solicitor Eugene Scalia, is forging ahead anyway. In October she met with lawyers from both sides of the employer-employee divide to solicit feedback. At that meeting in Washington, D.C., where she came under heavy questioning, McCutchen, the administrator of the Labor Department's wage-and-hour division, promised to issue proposed regulations for public comment before the end of March. Under the most optimistic scenarios, new rules could be on the books by early 2004.



U.S. Department of Labor's Tammy McCutchen image: Robert Burke

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If she pulls this off -- and there are plenty of skeptics who say the politics are insurmountable -- the impact would be huge. Corporations claim that the federal rules, not overhauled since the 1950s, exposed them to enormous liability when some enterprising plaintiffs' lawyers tested a few cases several years ago and struck it rich. If the federal rules can be updated and clarified -- and, ideally, if states follow suit -- employers argue the playing field would at least be level.

Gary Meade, general counsel of the El Segundo, Calif.-based sporting goods chain Big 5 Corp., thinks there's something very wrong with the current system. Last year Big 5 settled a 4-month-old state class action by its employees for more than \$2 million. Despite backing down, Meade says, "I still think to this day that we were OK" with how the company determined which workers were paid overtime and which weren't.

Big 5 got off easy. In July 2001, a month before the company was sued, a Bay Area jury socked Farmers Insurance Exchange with a \$90 million verdict for not paying overtime to its California-based insurance adjusters. That verdict, the largest ever in overtime litigation, sparked a nationwide case, now pending, against Farmers and a slew of copycat lawsuits against other insurers.

Most wage-and-hour cases, like Big 5's, settle before trial, and the list of eye-popping payouts is long and growing: SBC Pacific Bell paid \$62.8 million to get rid of Thierman's two cases. Starbucks Corp. shelled out \$18 million this fall to settle another Thierman lawsuit. Perdue Farms Inc. is paying \$20 million to rid itself of a Labor Department case and a private class action. Some Coca-Cola bottlers, Taco Bell Corp., U-Haul International Inc., Rite Aid Corp., and Shoney's Inc. have been on the hook for millions.

MANY TRIED, NONE SUCCEEDED

In the world of employment law, Anita Hill and sex harassment claims are out. Homer Simpson and time-punchers are in. The number of federal wage-and-hour cases filed last year exceeded, for the first time on record, the number of new federal employment discrimination cases combined, according to Department of Labor statistics. The reasons for the uptick are manifold, but it's clearly been fueled by a special provision in wage-and-hour law that allows plaintiffs to recover attorney fees.

Labor's McCutchen feels employers' pain. In the two years before she was plucked out of political obscurity to join the Bush administration in late 2001, McCutchen grappled with overtime issues as senior counsel for the Hershey Foods Corp. Every

day she would field questions about whether any one of the company's 14,000 employees was due time and a half or not. Each time, she says, "I gave it my best guess," not knowing if her advice would stand up in court. "The level of confidence of an in-house lawyer [on wage-and-hour issues]," she estimates, "is probably the lowest of any issue."

It wasn't supposed to be this way. The intent behind the Fair Labor Standards Act of 1938 was simple enough: to establish a minimum wage and the 40-hour workweek in order to encourage employment and to discourage the growth of sweatshops. Section 541 of the law, commonly known as the "white-collar" exemptions, carved out categories of workers -- executive, administrative and professional -- who are ineligible for overtime pay primarily on the basis of their salary levels and job duties.

Complicating matters is a provision in the law that authorizes states to enact their own wage-and-hour statutes. The law deemed most favorable to employees prevails. That provision is a big problem in states like California, which has become the hotbed of wage-and-hour litigation because laws on its books make it much harder for employers to exempt workers from overtime. While any revisions are unlikely to affect California's rigid laws, they could prompt amendments by the roughly 30 states that have wage-and-hour laws that mirror federal statutes.

Taking a whack at the federal lawsuit explosion won't be easy. "It's a political football," says Ellen Kearns, an employment partner in the D.C. office of New York's Epstein Becker & Green and editor in chief of a Bureau of National Affairs publication on federal labor laws.

Reform has been on the agency's agenda for more than a decade, and the closest any predecessor came to enacting change was during the waning days of the Carter administration. On the eve of Ronald Reagan's 1981 inauguration, the agency angered employers by pushing through a "midnight" order upping the minimum salary level that workers must earn to be ineligible for overtime. Under President Reagan the agency quickly stalled enforcement of the new regulation before it published, in 1985, its own "advanced notice" of proposed new rules. The effort stalled there.

STAFF SUPPORT

McCutchen isn't fooling herself about the odds. But she thinks there's a window of opportunity before the 2004 presidential campaign, and the attendant political posturing, gets under way. For one thing, she thinks the various forces are aligned, at least when it comes to a willingness to compromise for the sake of reform. She

says even her staff, many of them longtime liberals, is eager to modernize. Then there's that litigation overload, which, if nothing else, has focused the parties on the rules' obsolescence.

The way she sees it, corporations desperately want the agency to rewrite the so-called duties tests, which, under the 1954 regulations, spell out in mind-numbing detail the type of work an employee must perform in order to qualify as exempt. In return, she thinks employers are willing to give ground on a labor demand: an increase in the minimum weekly salary levels, which have topped out at \$250 per week since 1975, that qualify workers for non-exempt status.

The challenge, for both tests, is finding a middle ground. Both sides agree that the salary threshold, which comes to \$13,000 a year, is due for a hike. But they sharply disagree on how high it should go. Labor groups led by the AFL-CIO want to see the minimum yearly income raised to \$43,000, which is the 1975 level in today's dollars.

Business groups, according to McCutchen, indicate that \$25,000 is the most they can stomach financially. "That number [\$43,000] is grossly excessive in our view," says James Coleman, general counsel to The National Council of Chain Restaurants, whose members have borne the brunt of the litigation crusade and, along with The National Restaurant Association, wield enough clout to doom any reform. But if salary levels go up, Coleman says it's only fair that the duties test be revamped too.

Problem is, plaintiffs' lawyers and labor groups oppose any revisions to the duties test. To them, the reason that wage-and-hour cases have mushroomed in recent years has less to do with a lack of clarity than with greedy companies shortchanging workers in the pursuit of higher profits.

M. Reid Estes Jr., a Nashville lawyer who's brought several high-profile wage-and-hour cases, says corporations are demanding change now because they're no longer getting away with hiring a hamburger flipper, slapping the word "manager" in his title, and declaring him exempt from overtime pay. "They don't make any effort to comply with the law," insists Estes, who's settled cases with a trio of Coca-Cola bottlers for \$20.2 million and another with restaurant chain Shoney's Inc. for \$18 million.

Management-side lawyers counter that the duties test doesn't reflect modern business practices. When the test was implemented in the 1950s, the U.S. was largely agrarian and industrial, and many of the job titles described in the rules -- such as "key punch" and "linotype" operator, "gang leader" and "promotion man" -- don't exist

in today's service-driven economy.

"We're no longer just a white-or blue-collar workforce," says Timothy Bartl, the assistant general counsel of the pro-employer Labor Policy Association in Washington, D.C. "We're a 'gray-collar' workforce with a whole set of workers that just don't fall under the current system." As an example, Bartl says that an engineer with a two-year degree is likely eligible for overtime pay, while a colleague doing the same job who has a four-year degree isn't.

But Neil Ditchek, a staff attorney with the International Brotherhood of Teamsters in Washington, D.C., says employers are wrong to insist on more clarity. The Fair Labor Standards Act, he says, intended exceptions to overtime rules to be narrow and for the majority of workers to earn time and a half. The reason employers are up in arms, he says, is that private lawyers are now enforcing what the understaffed Labor Department hasn't been able to.

ANYONE HAVE A SOLUTION?

Neither industry nor labor groups, McCutchen said at press time in October, have yet to offer any viable solutions. A classic, and probably unworkable, example: Some company lawyers have proposed abolishing the duties test altogether in favor of a straight salary test. So, for instance, an employee who makes above, say, \$70,000 a year would be automatically exempt.

Michael Faillace, a 17-year veteran of IBM's legal department who is now an employment compliance consultant in New York, suggests a slight variation: Workers who earn above \$56,000 would be ineligible for overtime. Employees who make between \$21,000 and \$56,000 today would have to pass a partial duties test in order to be exempt from overtime. Everyone below \$21,000 would automatically earn time and a half.

The ideas, variations of which have been floated before, have critics on both sides. Differences in cost of living between, for instance, New York and Toledo make that unfeasible, say plaintiffs' lawyers.

Employers aren't thrilled, either. "We would have a big problem" with abolishing the duties test in favor of a high salary threshold, says Coleman of The National Council of Chain Restaurants. In any event, says McCutchen, eliminating the duties test would likely require congressional approval.

The mixed reactions reflect McCutchen's fundamental challenge. "There is going to be serious opposition almost no matter how you approach it," adds Coleman. So McCutchen takes the cynics in stride. Whatever she proposes, she says, "if I get

a little bit of screaming from both camps,
then I'll think I probably found the right
solution." Still, she knows the road ahead is
long: "There is a lot of work to be done,
and so many people have tried."

And, she doesn't need reminding, they've
hit dead ends.

