Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

VOLUME XXXXI, Issue 5 MAY 2023

THE DANGERS OF OFF-THE-CLOCK WORK

One of the most popular wage claims we see in court these days is a claim for back pay - often at overtime rates -- for "off-the-clock" work. Often the defendant did not authorize the work or did not ask for the work: in some cases, the employer did not even know the work was being performed. Nevertheless, off-the-clock work claims are common and often result in plaintiff verdicts or large settlements.

Part of the problem relates to a failure by employers to understand the legal definitions of work and how these definitions operate in practice. The Fair labor Standards Act (FLSA) has been interpreted consistently to require payment of wages even if the employer neither knew about nor authorized the work. Employers often fail to develop employment policies that can minimize such claims and preserve legal defenses when such claims arise.

Perhaps the beginning point in understanding these issues is to look at the definition of work. The FLSA states that an employer employs an employee when that employee is "suffered or permitted to work." The leading case held that an employee is "suffered or permitted to work" if: (1) he or she worked overtime without compensation; and (2) the "[employer] knew or should have known of the overtime work." Allen v. Board of Public Education for Bibb County, 495 F.3d 1306, 1314-15 (11th Cir. 2007).

The court went on to observe that "It is not relevant that the employer did not ask the employee to do the work. The reason that the employee performed the work also is not relevant. If the employer knows or has reason to believe that the employee has continued to work, the additional hours must be counted."

It has always intrigued this writer that the FLSA uses such antiquated language in its definition. Regardless of the awkward terminology, the effect is that the employer must pay for all hours actually worked even if the employer lacks actual knowledge that the work is being performed. Court rulings have held that "constructive knowledge" of an employee's work time is sufficient to make the employer responsible for those hours. The phrase "should have known" refers to the factual circumstances indicating that hours worked were open enough (i.e., not concealed) that the employer had an obligation to have known of the work.

A further danger is that employers sometimes keep insufficient or poor time records, and employees are becoming increasingly sophisticated about proving they actually worked additional time. If an employer does not keep accurate time records, the employee's rough notes or even mere estimates of the time worked often are sufficient to get a case to a jury or otherwise result in a victory for a plaintiff. It is the employer's legal duty to keep track of all hours worked.

The employer doesn't have to track hours for exempt employees who are paid on a salary basis, but if a court later determines that the employee did not qualify as exempt then reconstructing hours worked can be a painful and expensive proposition. We will explore misclassification another time.

So, what can an employer do to avoid these type situations and claims? The starting point, as in so many other employment issues, is to have appropriate written employment policies. The policies should explicitly prohibit off-the-clock work and should make it crystal-clear that employees must not perform work without obtaining advance permission to do so. The policies also must require employees to report all hours worked to the employer. Some employers take the extra step of requiring employees to "certify" with a signature the hours actually worked every pay period, including a statement that they have reported all hours worked.

Indeed, employers can and should counsel employees who fail to report off-the-clock work. A history of counseling employees in this manner helps to show the employer did not have "constructive knowledge" of such extra work and that employer is serious about paying employees for time actually worked.

Some employers make a common mistake when they know about extra work performed, but not reported, thinking that they do not have to pay the employee for such time because the extra work was not "authorized." This usually doesn't succeed. An employer can discipline a worker for working unauthorized extra time, but they must be paid for those hours. If the employee has violated the employer's rules for reporting time worked, the employee should be counseled and disciplined but nevertheless must be paid. The employer should investigate all claims of time worked but not paid. If needed, give training and counseling to the employee who fails to report all hours worked, but remember always that they must be paid.

Meal periods are especially susceptible to claims of working time not being compensated. Employees should be instructed to report all time worked, especially when they work through a meal break. This is particularly important when the employer has an automatic deduction for a meal break that must be overridden in the payroll system when the employee works through lunch.

Sometimes inexperienced supervisors allow work to go unreported, thinking they are helping the company. They're not: they actually may be getting their company into trouble. Supervisors should be trained that this is not permissible, and that all work performed must be reported and paid. Any suspicion of additional hours worked should be investigated and addressed promptly. A quick correction can protect against greater liability.

DOL REQUIREMENT TO REGISTER CERTIFICATION OF AFFIRMATIVE ACTION PLANS

For more than 50 years federal contractors have had an obligation to create and maintain written affirmative action plans. But many such contractors may not be aware of their legal obligations to do so. The government, through its Office of Federal Contract Compliance Program (OFCCP), is responsible for the enforcement of the federal government's federal contractor programs. Last year the OFCCP for the first time required federal contractors to certify that they had written affirmative action plans. There is an online portal for federal contractors to certify such plans, and this year the portal opened on March 31, 2023.

Covered contractors and subcontractors are obligated to certify the existence of their affirmative action plans by June 29, 2023. The portal will remain open past June 29, 2023 so contractors can continue to certify. New contractors have 120 days to develop their plans.

The OFCCP has taken the position publicly that companies that fail to timely certify their written affirmative action plans will be an enforcement priority for OFCCP audits of their employment practices and contractor compliance programs. Written affirmative action plans usually don't get reviewed by the OFCCP except when they are conducting an audit.

Under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973, a Federal contractor must develop an affirmative action program (AAP) if it has 50 or more employees and at least one contract of $50,000 or more with the Federal government. Affirmative action is defined by OFCCP regulations as the obligation on the part of the contractor to take action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or other protected factors. Practically speaking, this requires employers to make records of the sex, race, and ethnicity of those who apply for employment as well as those who are actually employed, and to be able to justify their representation in the workforce by comparison with statistics in their geographic area. Annual reports are supposed to be made to OFCCP demonstrating compliance with these regulations.

FEDERAL JUDGE DENIES ARBITRATION IN ENTIRE CASE WHERE THE EMPLOYER FAILED TO EXEMPT SEX HARASSMENT CLAIM FROM ARBITRATION

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) barred arbitration agreement provisions that required employees to arbitrate sexual assault/harassment claims. Most thought this law would simply remove those particular claims from overbroad arbitration agreements while allowing other claims in the case to proceed to arbitration. However, a New York federal judge has applied the law very broadly, by ruling: "The Court construes the EFAA to render an arbitration clause unenforceable as to the entire case involving a viably pled sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment." Johnson v. Everyrealm, Inc. (S.D. N.Y, 2023).

Editor's Note - Plaintiff lawyers favor court litigation over arbitration because they believe that juries offer a better potential for sympathetic and large plaintiff verdicts. This court ruling makes it likely that plaintiffs' lawyers across the country will try to add some type of sexual assault/harassment claim in court filings where they are aware that the employer has arbitration agreements requiring arbitration of employment claims. Plaintiffs' lawyers may attempt to add frivolous sexual harassment claims to more viable claims in order to try to evade enforcement of a mandatory arbitration agreement for the entire lawsuit.

It is likely that the Johnson case will be appealed and possibly reversed, because courts have interpreted the Federal Arbitration Act (FAA) to strongly favor upholding arbitration agreements. This decision nevertheless represents a danger to employers wanting to enforce mandatory arbitration agreements. Employers should expedite the review and amendment of their employment agreements to expressly exempt sex assault/harassment cases from the mandatory arbitration process. This will ensure that claims not involving sexual assault/harassment can proceed to individual arbitration rather than ending up in court and a potential jury ruling.

PROTECTING SEVERANCE AGREEMENTS FROM LABOR BOARD ATTACKS, CONFIDENTIALITY AND MANAGEMENT POSITIONS

Another area where employers need to review their policy terms relates to severance agreements. Employers typically include in severance agreements broad confidentiality and non-disparagement provisions, and really don't want other employees or the public to know what they have paid to secure a severance agreement. They also don't want former employees "bad-mouthing" the company. Unfortunately, the Biden Labor Board has now ruled that such provisions are unfair labor practices as confidentiality and non-disparagement terms have a tendency in its view to discourage concerted activity rights. McLaren Macomb, 372 NLRB No. 58 (2/21/23).

Fortunately, there are provisions in this ruling that will limit its application. First, the ruling only applies to "employees" under the Act, which excludes supervisory and managerial personnel. Second, although the inclusion of such language is an unfair labor practice, the effect will be only to exclude the enforceability of the confidentiality/disparagement provisions and will not bar the enforceability of the remainder of the settlement agreement. Nevertheless, employers might want to follow the suggestions in the NLRB ruling to limit the protection of the clauses to the actual employer (not including affiliates), to not impose penalties for violating the clauses, to limit the period of time for which the clauses apply, and to restrain only communications that are "disloyal, reckless or maliciously untrue."

At a minimum, employers should consider adding so-called "disclaimers" that suggest that the confidentiality and non-disparagement provisions are not intended to and will not be enforced in a manner to restrict the employee engaging in any rights guaranteed under the National Labor Relations Act.

Be sure to visit our website at http://www.wimlaw.com often for the latest legal updates, Alerts, and Firm biographical information!

WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED