WAGE AND OVERTIME QUARTERLY

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"Fighting For Fair Wages"

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WHY WE PAY REFERRAL FEES

Since starting this law firm almost five years ago, some of our most satisfying moments have been delivering referral fee checks to Trial Lawyers throughout Pennsylvania and elsewhere. As many of you know, we ***always*** pay a fair referral fee.

In some of our individual cases, the referral fee can be "small" because the total fee recovery is "small." For example, we just sent a nearby workers' compensation lawyer a $440 referral fee check. While this amount is "small," our appreciation towards referring counsel is BIG. And the prompt payment of the agreed-upon referral fee is a sign of our appreciation. Someday, this same lawyer will refer us a "bigger" case. The lawyer knows he can trust us to always fulfill our referral fee commitments.

Of course, the referral fees are not always "small." We recently delivered a $120,000 referral fee check to a Philadelphia workers' compensation lawyer. That was a good day for our law firm. Since the very beginning of our firm, this lawyer showed confidence us and the work we do. It was our privilege to deliver that referral fee check.

You see, it's really very simple: When our referring counsel do well, it means we have done well. Most importantly, it means ***our clients*** have done well.

Some "federal employment litigators" don't pay referral fees. Federal employment rights cases, they claim, are "too risky" and "too complex;" the "profit margins" are "too thin." This is pure bunk. If a lawsuit is too tenuous to support a referral fee, it probably should not be filed in federal court.

The refusal or failure to pay referral fees shows a lack of respect for you and your law firm. Real Trial Lawyers appreciate the significant time, energy, and money **YOU** have invested in having a law practice that attracts potential clients.

Thanks very much to those of you who have placed you confidence in our firm by referring us your wage and overtime clients. Paying you a well-deserved referral fee is the least we can do.

OUR NEW NAME: WINEBRAKE & SANTILLO, LLC

In the coming months, our law firm will be changing its name to Winebrake & Santillo, LLC. This name-change recognizes the enormous contribution that Attorney Andrew Santillo has made to our firm's success during the past four years. Our firm, our clients, and our co-counsel all know about Andy's tireless dedication to workers' rights and the success of this law firm. We are privileged to call him our friend and co-worker. And we are especially proud to have his name on our letterhead.

FLSA MYTHBUSTER: THE BOSS DOES NOT BENEFIT FROM SLOPPY OR INCOMPLETE RECORDKEEPING

In investigating wage and overtime cases, The Winebrake Law Firm often consults with workers and referring counsel who believe that a lawsuit will be too difficult to prove because the company has not maintained accurate time records, and, therefore, the worker will not have a sufficient evidentiary basis for her allegation that she worked long hours without receiving overtime pay. This concern is especially common in cases involving "salaried" workers who have been misclassified as exempt from the FLSA's overtime pay requirement. Many companies do not track the hours worked by salaried employees.

It's time to bust this myth. As discussed below, when the boss fails to keep accurate time records, he does so at his own peril.

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ABOUT THE WINEBRAKE LAW FIRM, LLC

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

The Winebrake Law Firm believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

The Winebrake Law Firm goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth millions of dollars to American workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***The Winebrake Law Firm*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. You never pay a fee unless you recover.

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Courts applying the FLSA recognize that company time records frequently are inaccurate or incomplete. According to the Supreme Court,

> time clocks do not necessarily record the actual time worked by employees. Where the employee is required to be on the premises or on duty at a different time, or where the payroll records or other facts indicate that work starts at an earlier or later period, the time clock records are not controlling. Only when they accurately reflect the period worked can they be used as an appropriate measurement of the hours worked.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690 (1946).

Moreover, because *the company* – not the worker – is obligated to maintain accurate records reflecting work hours, the lack of reliable data or recordkeeping can actually benefit *the worker* in litigation. As observed by the Supreme Court:

> The solution [to an employer's lack of accurate time records] is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act.

Anderson, 328 U.S. at 687-88.

Following the above principles, federal district courts frequently find that, in the absence of reliable time records, workers can prove their hours worked based entirely on the testimony of themselves and their co-workers. For example, in *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 335 (S.D.N.Y. 2005), the district court recognized that "it is possible for plaintiff to meet [his] burden [of proving hours worked] by relying on his recollection alone." Similar holdings abound.

In sum, workers and their advocates should not allow inaccurate or incomplete time records to discourage them from pursuing their wage and hour rights. If you, your friends, or your clients have not been paid for all hours worked, feel free to give our firm a call for a consultation.

IF YOU REPRESENT DELIVERY DRIVERS OR WAREHOUSE WORKERS, BE SURE TO PROTECT THEIR OVERTIME RIGHTS.

The federal Fair Labor Standards Act ("FLSA") generally provides workers with overtime premium pay calculated at 150% of the regular pay rate. The overtime laws however, exempt from this overtime pay requirement "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935." 29 U.S.C. § 213(b)(1). This exemption is known as the **Motor Carrier Act ("MCA") Exemption**.

As discussed below, many employers in the transportation industry are taking an overly-expansive view of the MCA Exemption and, in the process, illegally depriving many **Delivery Drivers** and **Warehouse Workers** of valuable overtime pay. Here's what you need to know, in a nutshell:

Delivery Drivers: Due to some recent amendments to the FLSA, truck drivers may not be covered by the MCA Exemption if they drive trucks with a gross vehicle weight of under 10,000 pounds. Moreover, companies can loose the exemption even if the driver only occasionally drives such light-weight vehicles.

Because many delivery drivers operate out of vans, pick-up trucks, or SUVs, they might not be covered by the MCA Exemption. In this regard, the FLSAs statutory and regulatory changes are complicated, ***so please do give us a call if your Delivery Driver clients are working over 40 hours per week without receiving overtime***. Our federal overtime lawsuits have recovered unpaid overtime wages for hundreds of delivery drivers who were wrongfully classified as covered by the MCA Exemption.

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SUPREME COURT STRENGTHENS FLSA'S PROTECTION AGAINST WORKPLACE RETALIATION

The United States Supreme Court handed workers a victory this year when it decided that federal Fair Labor Standards Act's ("FLSA's") anti-retaliation protections apply to an employee's **oral** complaints that he/she did not receive proper overtime pay. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 179 L. Ed. 2d 379 (2011). Previously, lower courts disagreed about whether the FLSA's anti-retaliation provision forbids employers from discharge or otherwise retaliating against an employee who complains to the boss about overtime but does not put the complaint in writing.

In the a majority opinion authored by Justice Stephen Breyer, the Court observed that enforcement of the FLSA's wage and overtime protections depends on complaints from employees that believe their FLSA rights have been violated. The Court rested its opinion on a detailed statutory analysis (far too boring for this Newsletter). In addition, however, the Court recognized that the FLSA was enacted during the New Deal, an era when illiteracy rates were particularly high among American workers. This fact supported the Court's conclusion that Congress, in passing the FLSA, did not intend to limit the anti-retaliation provision to those employees who were capable of drafting a written complaint.

We view the Supreme Court's *Kasten* decision as a breath of fresh air. The FLSA's enforcement scheme depends on workers standing up for their rights without fear of intimidation or reprisal. Importantly, the FLSA's anti-retaliation provision covers a broad range of retaliatory acts, such as, for example, termination, constructive discharge, demotion, job transfers, suspensions, and changes in benefits. In general, the company cannot subject the employee to any acts that might dissuade a reasonable worker from making or pursuing his/her FLSA rights.

Our firm has successfully represented employees who have been mistreated by the boss in response to complaints of wage or overtime violations. If you believe one of you clients may have been retaliated against for complaining about his/her wage or overtime rights, we would be delighted to be of assistance.

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Warehouse Workers: The MCA Exemption is not limited to drivers. According to federal Department of Labor ("DOL") regulations, the exemption also applies to **Loaders** whose work "directly affect[s] the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce." 29 C.F.R. §782.2(b)(2). Moreover, the DOL defines "Loaders" as employees "whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country." 29 C.F.R. §782.5.

Based on the above, whether a Warehouse Worker is covered by the MCA Exemption depends on the extent to which he/she is loading the truck and making judgments regarding the proper balancing of the load. Generally speaking, the more time a Warehouse Worker spends performing duties ***inside the warehouse*** (as opposed to at the loading dock), the less likely he/she is covered by the MCA Exemption.

For example, our law firm recently obtained a favorable ruling from the U.S. District Court in Harrisburg, Pennsylvania on behalf of 71 Warehouse Workers who regularly work over 40 hours per week without receiving overtime pay. The company argued that our clients were not entitled to overtime pay as a matter of law because they were exempt as "Loaders." The company emphasized that the workers placed inventory on skids, which were then placed in the trucks. We countered that the Warehouse Workers day-to-day duties were not sufficiently connected to "loading" trucks to warrant application of the MCA Exemption. The federal court agreed.

As with delivery drivers, a proper FLSA analysis requires careful of the facts and the FLSA's regulatory scheme. ***So please do give us a call if your Warehouse Worker clients are working over 40 hours per week without receiving overtime.***

QUARTERLY QUOTE

"The typical worker has had stagnating wages for a long time, despite enjoying some wage growth during the economic recovery of the late 1990s. While productivity grew 80% between 1979 and 2009, the hourly wage of the median worker grew by only 10.1%. *Economic Policy Institute Issue Brief #297, The Sad But True Story of wages in America (March 14, 2011).*"