WAGE AND HOUR QUARTERLY

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HOSPITAL AND NURSING HOME WORKERS CAN BENEFIT FROM FLSA "WORKWEEK AVERAGING" LITIGATION

A Pennsylvania hospital recently delivered checks to hundreds of workers who elected to participate in an FLSA collective action settlement negotiated by The Winebrake Law Firm and approved by the United States District Court. The lawsuit alleged that the hospital calculated overtime in violation of detailed federal regulations by improperly "averaging" overtime workweeks with non-overtime workweeks. It sure is nice when the "fine print" of complex federal rules and regulations can be used to benefit - rather than exploit - American workers and their families. So you should be aware of the following legal principles:

The FLSA requires that covered employees receive overtime compensation of "not less than one and one-half times" the employee's regular rate of pay. *See* 29 U.S.C. § 207(a)(1). Under the FLSA, overtime pay generally accrues whenever an employee works over 40 hours in a "workweek" consisting of a fixed and recurring period of *seven consecutive days*. *See* 29 C.F.R. §§778.103, 778.105. In calculating overtime hours, each individual workweek generally stands alone, and the "averaging" of workweeks is not permitted. *See* 29 C.F.R. §778.104.

However, the FLSA provides an exception to the 7-day workweek rule for certain health care employees. In particular, section 7(j) of the FLSA provides:

> No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, *pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work*, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(j) (emphasis supplied); *accord* 29 C.F.R. §778.601; *see also* 29 C.F.R. §516.23(b). This exception is known as the "8-and-80 Rule."

Practically speaking, the 8-and-80 Rule enables hospitals and nursing homes to avoid paying overtime when they implement 14-day work schedules wherein employees work a "long" week followed by a "short" week. Such schedules are popular because they enable hospitals and nursing homes to inexpensively cover weekend shifts. For example, many hospital/nursing home employees are assigned recurring schedules in which they work a 6-day, 48-hour week followed by a 4-day, 32-hour week. In the absence of the 8-and-80 Rule, these employees would be entitled to 8 hours of overtime pay during each 6-day, 48-hour week. This translates to approximately 200 hours of overtime pay per year. Under the 8-and-80 Rule, however, such employees receive no overtime pay because, within each 14-day period, the hospital/nursing home is allowed to "average" the long week with the short week.

But here's the catch: The 8-and-80 Rule can be utilized ***only*** "pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work." 29 U.S.C. §207(j). Importantly, "[t]he agreement or understanding between the employer and employee to use the 14-day period for computing overtime must be entered into before the work to which it is intended to apply is performed." 29 C.F.R. § 778.601(c). Moreover, the

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agreement or understanding "need not be in writing, but if it is not, a special record concerning it must be kept as required by part 516 of this chapter." *Id.* Finally, Part 516 requires "[a] copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect." *Id.* at §516.23(b).

The Winebrake Law Firm believes that many hospitals and nursing homes throughout the country overlook the technical requirements of the 8-and-80 Rule and do not properly obtain or document the "agreement or understanding" as required by the above federal regulations.

If you know or represent hospital or nursing home workers, you should ensure that their FLSA rights are not being violated. Of course, The Winebrake Law Firm would be delighted to consult with you or your clients concerning potential violations of the 8-and-80 Rule.

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

In investigating wage and hour cases, The Winebrake Law Firm often consults with workers and referring counsel who believe that a wage and hour 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.

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. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

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.[1]

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, you should consult with an experienced wage and hour lawyer.

[1] *See, e.g., Falleson v. Paul T. Freund Corp.*, 2007 U.S. Dist. LEXIS 87473, *9-14 (W.D.N.Y. Nov. 28, 2007); *Rivera v. Ndola Pharmacy Corp.*, 497 F. Supp. 2d 381, 389-92 (E.D.N.Y. 2007); *Kiesz v. General Parts, Inc.*, 2007 U.S. Dist. LEXIS 24015, *17-18 (D.S.D. Mar. 28, 2007); *Chan v. Sung Yue Tung Corp.*, 2007 U.S. Dist. LEXIS 7770, *65-69 (S.D.N.Y. Feb. 1, 2007); *Turner v. Human Genome Sciences, Inc.*, 292 F. Supp. 2d 738, 748 (D. Md. 2003); *Moon v. Joon Gab Kwon*, 248 F. Supp. 2d 201, 219-22 (S.D.N.Y. 2002).

PENNSYLVANIA MINIMUM WAGE ACT CONTINUES TO PROVIDE HOPE FOR UNDERPAID AND OVERWORKED HOME HEALTH AIDS

In the Summer 2007 edition of the *Wage and Hour Quarterly*, we reviewed the Supreme Court's disappointing holding in *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), that home health aids are exempt from the Fair Labor Standards Act's minimum wage and overtime provisions. On a more optimistic note, however, we observed that home health aids might be entitled to overtime pay under Pennsylvania's more worker-friendly Minimum Wage Act.

Recent filings in a pending Pennsylvania Commonwealth Court proceeding entitled *Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry*, Docket No. 477 M.D. 2007, reveal that the Pennsylvania Department of Labor and Industry agrees with The Winebrake Law Firm's view that the Pennsylvania Minimum Wage Act (PMWA) entitles home health aids to overtime pay. Also, in the absence of an exemption, the PMWA may entitle home health aids to be paid for time spent traveling between clients during the workday.

Home health aids are among the most overworked and underpaid workers in Pennsylvania. They usually are employed by third-party home health agencies, and their jobs consist of visiting the homes of elderly or disabled clients to assist with daily living activities such as dressing, bathing, housekeeping, and cooking. Many home health aids work over 40 hours per week without receiving the time-and-one-half overtime premium, and they almost never are paid for the substantial time they spend traveling between clients during the workday.

Many of the recipients of this newsletter represent current or former home health aids in worker's compensation cases and other litigation. According to the Pennsylvania Department of Labor and Industry, these low-wage workers deserve to be paid for their overtime and, possibly, their travel time. Please reach out to these deserving clients and find out if their rights are being violated. The Winebrake Law Firm - which always pays a fair referral fee - would be delighted to work with your firm in bringing justice to your home health aid clients.

"QUARTERLY QUOTE"

"Median wages of production workers, who comprise 80 percent of the workforce, haven't risen in 30 years, adjusted for inflation."

Robert Reich, former Secretary of Labor

THIRD CIRCUIT COURT OF APPEALS ENDORSES "BROAD DEFINITION" OF COMPENSABLE WORK UNDER THE FLSA. DECISION WILL BENEFIT THOUSANDS OF WORKERS IN PENNSYLVANIA, NEW JERSEY, AND DELAWARE.

In September 2007, the United States Court of Appeals for the Third Circuit issued its much-anticipated decision in *DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007). The decision is a victory for workers within the Third Circuit - which includes Pennsylvania, Delaware, and New Jersey - because the Court rejected the overly-restrictive definition of compensable work advocated by big business and its high-powered friends, such as the United States Chamber of Commerce, the National Chicken Council, and the American Meat Institute, all of whom filed *amicus* briefs opposing the workers' position.

The *DeAsencio* lawsuit was brought by a group of poultry workers who sought compensation under the FLSA for unpaid activities such as (i) gathering and donning smocks, gloves, hairnets, and other company-mandated gear at the beginning of the workday, (ii) washing themselves and certain gear at the beginning of the workday, (iii) traveling to their workstation at the beginning of the workday, and (iv) doffing and returning company-mandated gear at the end of the workday. The company asserted that such activities were not compensable because, among other reasons, the activities did not require substantial physical or mental "exertion."

On appeal, a unanimous Third Circuit Court rejected the notion that an activity's compensability under the FLSA turns on the degree of "exertion" required by the activity. The Court explained that a "broad definition of work" applies when determining whether "preliminary" and "postliminary" activities are compensable. What matters, the Court explained, is whether the activities are "integral and indispensable" to the worker's principal activities. Thus, because the wearing of sanitary and protective gear is mandatory due to the nature of poultry processing, the compensable workday begins when the poultry worker picks up his first item of gear, and the worker is entitled to be paid from that moment forward. Whether this first compensable act requires substantial mental or physical "exertion" is irrelevant to the worker's right to be paid.

If you know or represent workers who are required to perform pre-shift activities, you should be on the lookout for potential FLSA violations. The Winebrake Law Firm represents hundreds of workers in collective action lawsuits seeking compensation for time spent engaged in pre-shift activities. These lawsuits, which currently are pending in federal courts in Pennsylvania, Mississippi, Georgia, and Arkansas, seek full compensation for an array of pre-shift activities, including: gathering and donning company mandated equipment; traveling to the workstation; programming or "logging in" to computer systems; attending pre-shift meetings; and performing pre-shift exercises.

ABOUT THE WINEBRAKE LAW FIRM

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 hour laws.

Wage and hour law 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 hour 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 Federal 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. Attorney Pete Winebrake has negotiated settlements in federal wage and hour lawsuits worth millions of dollars to American workers and their families.

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

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