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Owners, managers face personal risk on FLSA claims

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As most business owners and managers know, the federal Fair Labor Standards Act (FLSA) requires all covered employers to pay overtime compensation to any nonexempt employee who works more than 40 hours in a week. Under the FLSA, however, "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." The definition is a bit circular (using the word employer to define employer), but note that the FLSA's interpretation is expansive in order to achieve its broad remedial purposes. So when does an individual qualify as an "employer" under the FLSA? That definition encompasses more individuals than you may think. A recent Arizona case illustrates the personal liability risk for owners and managers on FLSA claims.

FLSA personal liability

Most employment laws apply only to the specific legal entity for whom the employee works (corporation, limited liability company, or similar entity). Under the FLSA, however, "any person acting directly or indirectly in the interest of the employer" can *individually* responsible for the employer's overtime violations.

Courts typically consider four factors in assessing potential individual liability. They look at whether the individual:

1. Has the authority to hire and fire employees;
2. Determines the rate and method of payment;
3. Supervises and controls work schedules or conditions of employment; and
4. Maintains employment records.

No single factor is dispositive on its own. Courts consider the "circumstances of the whole activity" in assessing whether the individual can be said to be "acting directly or indirectly in the interest of the employer."

Arizona case

The federal court in Arizona recently addressed this issue in a case filed by the U.S. Department of Labor (DOL) against a local building contractor. The DOL claimed that the contractor failed to pay overtime and keep appropriate records in violation of the FLSA. It also sought to hold the contractor's president *personally* responsible for those violations.

The contractor's president asked the court to dismiss him from the case, asserting that he wasn't the workers' "employer" under the FLSA. But the court denied that request and ruled that he could indeed be personally liable.

The court noted that although the president had delegated many of the day-to-day operations to other supervisors, he nevertheless maintained authority over many management functions. He had the authority to hire and fire employees as well as set their pay rates. He also had the authority to make decisions about the method of payment (cash or check) and about employee benefits. He argued that he actually hadn't exercised his authority over such matters in many years. But the court pointed out that the pertinent question was whether he *possessed* the authority, not whether he actually *exercised* it.

The court also noted that the president held a significant ownership interest in the company. And although he wasn't a majority owner, he was the only owner who was active in the management of the business. Those facts buttressed the court's conclusion that he had the requisite authority to be personally liable for FLSA violations.

The evidence indicated that the president also had at least some involvement in maintaining employment records. Although the company's HR and payroll staff had the primary responsibility for such records, the fact that the president was involved at all was a factor in determining that he could be responsible under the FLSA.

The court also considered the issue of employee scheduling. The president claimed that the pertinent employees (who worked in the field) actually determined their own schedules. The court concluded that the evidence was in dispute, but because no single factor is dispositive, the issue didn't alter its conclusion.

Recommendations

The recent Arizona case reflects a growing trend among plaintiffs' attorneys to sue companies *and* individual owners and supervisors for claimed FLSA violations. As the case indicates, the legal principles authorize such claims and create risk for individuals.

The only practical way for an owner or manager to eliminate that risk, of course, is to ensure that the company itself is in compliance with the minimum wage and overtime obligations of the statute. That means making sure it properly records all hours worked by nonexempt employees and properly pays them at no less than the minimum wage and for any overtime they work in any given week. Individual owners, supervisors, and managers who possess or exercise the kind of authority the court discussed in the recent case are well-advised to be sure their companies are complying with those obligations.

More and more employers also are taking advantage of recent U.S. Supreme Court decisions enforcing agreements to submit FLSA claims to binding arbitration, which can be a far quicker, less expensive, and more reliable process than civil litigation for resolving all types of employment disputes, including FLSA claims. Properly worded arbitration agreements also can avoid "class action" FLSA claims. Employers that don't presently use arbitration agreements with their employees should strongly consider doing so.

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