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Large volume of payroll transactions no excuse for overtime violation

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The Fair Labor Standards Act (FLSA) requires all covered employers to pay a premium to nonexempt employees who work more than 40 hours in a workweek. Generally, an employer's liability for failing to pay the proper overtime rate to employees is limited by the two-year statute of limitations imposed by the FLSA. However, the Act's statute of limitations for overtime violations may be extended to three years when an employer's failure to pay overtime arises from a willful violation. To be willful, the violation must not be merely negligent.

Whether a violation is willful is largely determined by the factual circumstances that led to the violation. What happens when, unbeknownst to supervisors, an "entry-level employee" commits the violation?

Clerk follows instructions

ESSG is a staffing company that recruits, places, and assigns people to work at various jobsites. ESSG assigned employees to work at a jobsite run by TBG Logistics. At the jobsite, TBG directed employees' work and tracked the hours each employee worked. TBG kept a spreadsheet showing the number of hours each employee worked and how the employee should be paid (e.g., regular rate or overtime rate). TBG submitted its spreadsheets for payroll processing by an ESSG payroll clerk.

In early November 2012, TBG submitted a payroll spreadsheet for processing by ESSG. The spreadsheet reflected the fact that many employees had worked more than 40 hours during a workweek, but stated that all hours should be paid at the regular rate. The ESSG payroll clerk prepared a preliminary draft report that showed employees who worked more than 40 hours would be paid 1Â½ times their regular rate for the overtime hours. When the payroll clerk sent the report out for TBG review, she was directed to process the payroll exactly as TBG specified—i.e., all hours should be paid as straight-time regular hours.

The payroll clerk received no guidance on why processing payroll in the way TBG requested would be appropriate, and she didn't ask her supervisors for guidance. She processed the TBG payroll in the same manner until ESSG's relationship with TBG ended in July 2014.

On August 30, 2016, the U.S. Department of Labor (DOL) sued ESSG, among other entities, alleging it violated the FLSA by failing to pay overtime to the employees it staffed at TBG. Because of the timing of the lawsuit and the fact that ESSG had stopped processing payroll for TBG in July 2014, the DOL could pursue back wages against ESSG only if the statute of limitations was extended to three years based on a willful violation of the FLSA. If ESSG didn't willfully violate the FLSA, the case would have to be dismissed. But if ESSG's violations were deemed willful, it would be liable for all back overtime wages from August 30, 2013, to July 24, 2014.

Was violation willful?

For the violation to be willful, ESSG must have known it was violating the FLSA, or it must have shown a reckless disregard for whether its conduct was prohibited by the Act. The DOL presented evidence in support of its claim for willful violations.

In November 2012, the payroll clerk generated a report reflecting that the TBG employees who worked more than 40 hours in a workweek would receive 1Â½ times their regular hourly rate for their overtime hours. It wasn't until she was told to process the payroll exactly as TBG submitted it that she ran the payroll without paying the overtime rate to employees who worked more than 40 hours. To accomplish that, she had to dismiss error messages generated by ESSG's software program.

Despite those error messages, the payroll clerk never questioned the legality of how she was processing the payroll or sought guidance from her supervisor. During the relevant time period, there were 1,103 instances of employees not being paid the overtime they were owed, an average of 22 violations per week. The payroll clerk had to dismiss error messages for each violation.

ESSG disagreed that the payroll clerk's actions were evidence of a willful violation, claiming it couldn't have acted willfully because it's a large company that processes a large number of payroll transactions, and it violated the FLSA only a handful of times (in only 0.3 percent of all transactions during the relevant period). Given that compliance record, ESSG argued, "it would be extremely impractical to require a company . . . to conduct a companywide audit on a whim to look for a problem that didn't exist and which it did not even suspect existed."

The court rejected EESG's argument because it was undisputed that the company failed to pay the overtime the TBG employees were owed, indicating a problem did exist. The court noted that the FLSA doesn't contain an exemption for large employers, regardless of the number of payroll transactions they might process.

ESSG also defended itself against the willfulness claim by arguing that it delegated FLSA compliance to its payroll clerk, a low-level employee, and there was no evidence that high-ranking employees were aware of the violations. Again, the court disagreed, finding that ESSG willfully violated the FLSA and owed back wages and liquidated damages to the affected employees dating back three years.

Available preventive measures

Although ESSG's software system contained safeguards to ensure that it didn't process payroll in a way that would violate the FLSA, software alone cannot guarantee compliance. The safeguard was a good first step toward compliance, but human error intervened. Something as simple as requiring a supervisor override of error messages would have stopped the violation before it started.

Other safeguards include conducting periodic internal audits to catch errors or issues before they continue for an extended period. In addition, you should require employees to run any changes or deviations in payroll processing by a supervisor or upper-level manager to ensure FLSA compliance. When in doubt, seek answers from legal counsel.

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