Pay Practices a Concern for Processors

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Recently, a federal judge in Wichita, KS, gave the green light to a class of up to 700 slaughterhouse workers to proceed with a lawsuit against their employer for unpaid wages. The lawsuit claims that Creekstone Farms Premium Beef, an Arkansas City, KS, beef slaughterhouse, did not pay employees for all time they worked, including overtime.

At issue is a compensation practice known as “gang time,” which the plaintiffs allege violates the federal Fair Labor Standards Act (FLSA). The gang time practice, as used by Creekstone, pays employees only for time when the production line is moving, plus 10 minutes for putting on and removing protective gear. The court’s recent decision does not include a ruling on the substance of the case, but it does indicate the court’s finding that the plaintiffs had satisfied the initial showing necessary to move forward.

The judge’s order requires the company to provide names, addresses, and telephone numbers of other current and former employees, and allows the plaintiffs to send notices to those individuals to see if they wish to join the lawsuit. In addition, Creekstone was ordered to post a notice about the lawsuit in its plant.

Similar compensation practices of meat and poultry producers have been closely examined by courts in recent years, with somewhat varying results, depending on the specific facts of each case, and also, in some cases, on existing legal precedent in certain federal circuits. Despite these differences, however, a review of selected

court decisions from 2010 to the present reveals important trends that should be considered by processing employers.

Under the FLSA, an employer must pay its employees a specified minimum wage for up to 40 hours of work each week, and one-and-one-half times the regular rate of pay for all work in excess of 40 in a workweek. In 1947, Congress passed the Portal-to-Portal Act, providing that an employer may not be required to pay employees for certain activities taking place before and after an employee's shift.

Because some important terms, such as "work," are not defined in the FLSA, courts have been left to define what activities constitute "work" and to decide whether an employer has violated the FLSA by failing to pay its employees for those activities. More than 50 years later, courts are still busy attempting to define employers' obligations under these laws.

Production employees in meat and poultry processing plants are typically required to wear uniforms, smocks or other clothing for sanitary purposes, as well as personal protective and safety equipment, such as boots, hairnets, ear plugs, hard hats, arm guards, gloves, safety glasses and other items. Most of the recent lawsuits focus on whether the time spent putting on and taking off (donning and doffing) those clothes and equipment is a part of the employees' workday for which they must be paid, and also whether the employee must be paid for time spent walking to the work location, washing, waiting for the production line to begin moving and other subsequent activities.

Historically, many employers conceded that employees should be paid some amount for donning and doffing, and assigned a specific number of minutes of daily paid time for such activities. Those arrangements, sometimes referred to as "plug time," were often incorporated into collective bargaining agreements in union plants.

Most recent court decisions make clear that — where uniforms and safety equipment is worn for the employer's benefit (which is highly likely) — the time that employees spend putting them on and taking them off is considered time worked, and thus compensable. Further, since the FLSA requires that employees be paid for actual time worked, employers may not be able to satisfy the FLSA by establishing a fixed, reasonable amount of time for donning and doffing.

An exception may exist where a collective bargaining agreement is in place, and the parties to the agreement have agreed to a particular amount of time for donning and doffing. In recent decades, meat and poultry processors have tended to locate their plants in certain states and rural areas where their workforces are less likely to be represented by unions. As a result, there is a lower likelihood that a collective bargaining agreement provides a defense in such plants.

Where donning and doffing must be paid, and where actual working time must be recorded starting from the beginning of the employee's dressing into uniform and putting on safety equipment, the employee's subsequent time spent walking, waiting and performing other activities during the workday is increasingly likely to

be viewed as part of the continuous workday — and thus, to be compensable under the FLSA.

(Even so, some courts have found that there are certain activities for which employers generally need not compensate employees; for instance, time spent changing in and out of protective gear during unpaid meal periods.) This tends to invalidate a gang time payment practice, except where it has been negotiated and agreed to in a collective bargaining agreement.

Perhaps as important to processing businesses as the ultimate outcome of such a claim, an FLSA lawsuit poses a major inconvenience and expense, even for companies that believe their pay practices can withstand legal scrutiny. Federal courts apply lenient standards in requiring the cooperation of a defendant employer in plaintiffs' efforts to locate additional interested individuals to form a larger class. And, even where a defendant company mounts a strong defense, unless the company wins the lawsuit outright, it is likely to be responsible for the plaintiffs' attorneys fees and costs over the entire course of the lawsuit.

The attorneys' fees are often the largest financial risk faced by the company in an FLSA lawsuit, as the wage amounts claimed may be very small for each plaintiff. Of course, the company also faces the considerable expense of its own attorneys' fees and costs, in addition to the diversion of time and attention of its executives and managers over the litigation period. It is not surprising that many FLSA lawsuits never result in an ultimate judgment by a court, as settlement is often reached at some point along the way.

Although much of the recent FLSA litigation has focused on meat and poultry processors, the same FLSA requirements apply to all processing businesses. It is prudent for all industry employers to carefully review pay practices for production employees with an attorney to avoid becoming a likely target of a lawsuit.

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