

The Federal Fair Labor Standards Act (FLSA), and state law equivalent mandate payment of a minimum wage and payment of time and one half of a non exempt employee's hourly wage for hours worked in excess of 40 in a week. The concepts appear straightforward, yet for an increasing number of employers, particularly those in the food industry, the past two years has shown a significant increase in costly wage/hour litigation. All indicators point to a continuation, if not escalation, of this trend for a number of reasons.

First, recovery in a wage hour lawsuit is not limited to a single complaining employee. Typically, suits are filed on behalf of multiple plaintiffs or as a class or collective action. In addition to the recovery of damages equal to the unpaid wages, a successful plaintiff also receives statutory damages (equaling up to 125% of actual damages) and their attorney's fees. Multiple claimants and enhanced recovery have made wage/hour lawsuits a haven for plaintiff's lawyers.

Second, because of a less than stellar history of compliance, the food industry has been targeted by the U.S. Department of Labor (USDOL). "Fact Sheet #2 Restaurants and Fast Food Establishments" on the USDOL website specifies issues for scrutiny and investigation.

Intent to violate the law is not necessary for a finding of liability under the FLSA. Therefore, it is critical that food industry employers familiarize themselves with the requirements of the law. Auditing pay practices with an eye to eliminating unintended consequences has become a virtual necessity.

The primary areas of wage/hour vulnerability to the restaurant industry includes the failure to pay for all hours worked, failure to pay overtime; misapplication of the tip credit; failure to conform to wage/hours requirements of local law; and, ineffective recordkeeping.

The failure to pay an employee for all hours worked often stems from the employee's conscientious work ethic. For example, an employee who starts work prior to the official start of their day or stays after the end of the shift to complete assignments is to be paid for that time even if such work is prohibited by policy. Discipline, not a failure to pay, is the employer's remedy. Similarly, employees who work through an unpaid meal period or who do not enjoy an uninterrupted meal period are entitled to payment.

Many employers have mistakenly believed that payment of a salary eliminates the requirement to pay overtime. Other

employers have incorrectly assumed that a salary, together with a management title (e.g., assistant manager, chef, etc.), relieves them of an overtime payment. In fact, it is only when a salary is paid and criteria (duties and functions) are met that an individual will be deemed exempt from overtime under the FLSA executive, administrative or professional exemptions.

Those employees routinely receiving tips may be paid somewhat less than the minimum (how much less may vary from state to state) if certain conditions are met. This so called "tip credit" requires advance notice to the employee and that tips and wages combined equal or exceed the minimum wage. If, however, tips are pooled and shared with individuals who customarily do not receive tips (e.g., employer, manager, janitor, etc.) the tip credit is lost and the full minimum wage must be paid.

As every state has its own wage/hour statute, attention must be given to those local laws imposing obligations greater than those under the FLSA. For example, New York has a "spread of hours" rule which mandates the payment of one additional hour, at minimum wage, when the interval between the beginning and end of an employee's workday exceeds 10 hours. Whether the additional hour is paid turns on whether the employee's weekly compensation is equal to or greater than the minimum wages due including the compensation for the additional hour.

Pay practices should be reflected in accurate records. The failure to maintain records is a violation of the FLSA and permits any form of evidence, including a plaintiff's testimony, to establish a violation.

Violations of the FLSA and state law cannot be waived. However, every day of compliance replaces a like period of noncompliance. Clearly, an audit of payroll practices and alteration of those which are noncompliant provide the best means to avoid a damaging wage/hour suit.

*Peter A. Schneider is co-head of the Labor and Employment Law Practice Group at Meltzer Lippe Goldstein & Breitstone, LLP, based in Mineola, New York. He has devoted his entire 35-year career to the practice of labor and employment law exclusively on behalf of management. He can be reached at: 516-747-0300, ext. 179, or by email at pschneider@meltzerlippe.com.*