In the Courts

More FLSA Suits Filed in Fla. Than Any Other State

Florida has become a hotbed for Fair Labor Standards Act litigation in recent years.

From 2004 through 2009, more than a third of all FLSA lawsuits were filed in Florida, even though the state represents only 6 percent of the nation's population (see chart, p. 4).

Attorneys who practice in Florida and other observers attribute the state's disproportionate share of FLSA litigation to a variety of factors, including its large number of small businesses, its aggressive plaintiffs' bar and its relative lack of state wage and hour laws.

The trend appears to have peaked in 2007 and 2008, during which Florida accounted for almost half of all FLSA lawsuits filed nationwide. Since then, the pace of litigation has dropped off slightly, possibly the result of a judicial backlash against overzealous plaintiffs' attorneys (see box, p. 4).

Florida nevertheless remains a legal threat. Employers operating there should carefully review their wage and hour practices to ensure compliance.

The Wild, Wild Southeast

One explanation for Florida's high rate of FLSA litigation is that two of the state's largest industries, hospitality and construction, attract a large number of smaller start-up businesses.

These employers typically "lack sophisticated HR departments" and either are not aware of the FLSA's requirements or hope to fly under the radar because of their small size, commented David H. Spalter, an attorney at Jill Schwartz & Associates, P.A., in Winter Park, Fla., and a member of the *Guide*'s editorial advisory board.

In states with more manufacturers and other large employers, there is less wage and hour litigation, noted Sally Still, a partner at Buckingham Doolittle & Burroughs, LLP, in Boca Raton, Fla. Large employers, among other things, are "far more compliant," and more intimidating to sue. In contrast, smaller employers are much more exposed to liability as they lack the resources to fight lawsuits effectively.

Many small businesses "quickly realize that it is cheaper to pay a small claim and the plaintiff's attorney's fee than it is to defend the claims," observed Judge Kenneth L. Ryskamp of the U.S. District Court for the Southern District of Florida (*Hamm v. TBC Corporation*, 597 F. Supp. 2d 1338 (S.D. Fla. 2009), *aff'd*, No. 09-11221, 2009 WL 2599663 (11th Cir. Aug. 25, 2009)).

Because it is more expensive to litigate a claim than to settle it, the vast majority of FLSA claims in Florida are settled. "If liability is not contested, and it is simply

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a matter of resolving the matter, it may ... cost over $10,000 to resolve a claim worth under $5,000, once fees are added," Spalter noted. "However, despite these costs, employers are often reluctant to mount a defense, as it can cost even more to win the case."

An Aggressive Plaintiffs' Bar

There is "heavy advertising" by the plaintiffs' bar in Florida, noted William J. Cutler, of Cutler Consulting Services, a wage and hour consulting firm in San Antonio, Fla.

The plaintiffs' bar in Florida is "very proactive in seeking out clients and cases," agreed Susan N. Eisenberg, a shareholder at Akerman Senterfitt's Miami office.

Although Elizabeth Tarbert, ethics counsel for the Florida Bar, notes that the Bar "is considered to have one of the most restrictive" attorney advertising rules in the country, attorneys nonetheless may target individual prospective clients through advertisements and direct-mail and e-mail campaigns.

Plaintiffs' attorneys in Florida reach prospective clients, said Eisenberg, via "billboards, letter-writing campaigns, blast e-mail campaigns, Web sites and blogs."

A Lack of State Laws

Another reason for Florida's high rate of FLSA litigation could be its relatively limited wage and hour requirements (see ¶1129 of the *Guide*). Unlike many other states, Florida does not regulate overtime.

With few state requirements to follow, employers are less likely to follow the federal law, according to Cutler. "State laws undergird compliance," he said.

And when employers fail to comply, employees have only the federal courts to seek redress.

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Number of lawsuits filed

Year	Florida	Nationwide
2009	2,139	6,131
2008	2,349	5,202
2007	2,434	5,051
2006	1,824	6,683
2005	1,811	4,006
2004	999	2,544
Total	11,557	29,617

Source: Justia.com

Are Florida's Judges Turning the Tide?

Federal judges' frustration with an onslaught of cases and the questionable tactics of some plaintiffs' attorneys may be helping to slow the rate of Fair Labor Standards Act litigation in Florida.

After peaking in 2007 and 2008, the number of lawsuits filed in Florida dropped slightly in 2009 (see chart, above). Some observers believe this decline is the result of a "judicial backlash" that includes judges denying plaintiffs attorney's fees, reducing contingency fees and sanctioning plaintiffs' attorneys.

"I believe that the backlash has, and will likely continue to, impact the number of FLSA cases filed in Florida," said David H. Spalter, an attorney at Jill Schwartz & Associates, P.A., in Winter Park, Fla., and a member of the *Guide*'s editorial advisory board. "While there are many attorneys who specialize in employment law who will continue to litigate these claims, general practice firms that have marketed in this area of the law in recent years ... will likely search for 'greener pastures'."

Two issues in particular have prompted the backlash, according to Susan N. Eisenberg, a shareholder at Akerman Senterfitt's Miami office. The first is improper solicitation; the second is "failure to litigate" — in which firms take on more cases than they can handle and, as a result, miss deadlines.

Some recent examples of this backlash include the following:

- A law firm was sanctioned for "unethically soliciting clients" (*Hamm v. TBC Corporation*, 597 F. Supp. 2d 1338 (S.D. Fla. 2009), *aff'd*, No. 09-11221, 2009 WL 2599663 (11th Cir. Aug. 25, 2009)).
- A plaintiff's attorneys were denied attorney's fees because they had failed to either notify the employer of the claim before filing suit or otherwise try to resolve the dispute (*Sahyers v. Prugh*, 560 F.3d 1241 (11th Cir. 2009)).
- Plaintiffs' attorneys' contingency fee was reduced, because the agreed-upon 40 percent contingency fee, plus costs, was "unreasonable" (*Silva v. Miller*, 547 F.Supp.2d 1299 (S.D. Fla. 2008), *aff'd*, 307 Fed. Appx. 349 (11th Cir. 2009)).

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to employers. As illustrated above, the positions present "production worker"-like problems, and in other instances many entry-level social services positions may lack the discretion and independent judgment necessary to qualify.

The Executive Exemption

Little has been written, or litigated, about the FLSA exemption for bona fide executives as it relates to social worker positions. As a general rule, a position that might qualify for the executive exemption must entail the responsibilities and discretion associated with high-level management — and a coordinator who generally supervises other social workers, particularly in regard to their schedules, would not qualify.

Among other requirements, an exempt executive must "customarily and regularly direct the work of two or more other employees" (29 C.F.R. §541.100(a); see ¶330 of the *Guide*). Because many social services agencies tend to be sparsely staffed, an employee who might otherwise qualify for an executive exemption may be unlikely to supervise two or more people. Thus, in analyzing application of the executive exemption, care must be given to each of the above-noted requirements.

Conclusion

Employers seeking to exempt social work positions from FLSA requirements should be aware of the various limitations created by the body of DOL rulings and case law. Such employers may want to focus on the specialized educational backgrounds required for a job, keeping in mind the distinctions discussed above.

Shlomo D. Katz, counsel in the Washington, D.C., office of Brown Rudnick LLP, practices wage and hour law and advises clients on FLSA issues. He has successfully litigated before federal, state and local courts and also is a co-author of Thompson Publishing Group's four FLSA publications.

Tammy Hopkins is a member of the government contracts & litigation group in the Washington, D.C., office of Brown Rudnick LLP. Ms. Hopkins also has assisted clients in wage and hour class actions, including collective actions arising under the Fair Labor Standards Act.

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Obviously, this can't account entirely for Florida's disproportionate share of FLSA claims — after all, its Gulf Coast neighbors Alabama, Louisiana and Mississippi also lack state laws, but don't have nearly the same rate of litigation.

Nevertheless, the lack of state regulation appears to be a contributing factor, especially when the situation in Florida is compared with California, where state wage and hour requirements abound (see ¶1124 of the *Guide*). FLSA litigation is plentiful in California, but still represents only a fraction of the claims filed in Florida.

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