

Long Island BusinessNEWS

Employment Practices Receive Increased Scrutiny

by Laura Glasser

Local attorneys report a sharp increase in litigation regarding Fair Labor Standards Act matters. The FLSA is a federal statute that establishes minimum wage, overtime pay, record keeping and youth employment standards, and every business with more than \$500,000 in annual revenue must comply with it.

According to the 2009 Law360 Litigation Almanac published by Manhattan-based Portfolio Media Inc., the number of new FLSA suits filed in 2008 rose by about 5 percent over the previous year. The report predicted that litigations would increase further in 2009 amid large numbers of layoffs and other terminations.

"Our FLSA case filings are up more than 100 percent from last year," said Troy P. Kessler, a partner at Misiano Shulman Capetola & Kessler in Melville, who represents individuals against employers.

Plaintiffs' attorneys have become more receptive to so-called wage-and-hour cases, because of increased awareness that there is money to be made. "What makes these cases so attractive is that a case can grow to include more than one employee and become a collective action, which is similar to a class action," Kessler said. "If someone's rights have been violated by \$5,000, there may be five others in a similar situation, which will bring the total to \$30,000."

In an economic downturn, litigation generally increases as more people lose their jobs, said Dominique Camacho Moran, head of the labor and employment practice group of Farrell Fritz, a Uniondale-based law firm. "If an employee goes to a lawyer and says, 'I lost my job and it's unfair,' you don't

want the lawyer turning around and saying, 'It's also unlawful,'" she said. "In many cases, the claimant goes to the attorney for another reason, and the lawyer finds out there is a wage-and-hour violation and brings a lawsuit for that."

The biggest issues concern how employees are classified and how overtime is calculated.

Employees may be classified as exempt or nonexempt. Unlike exempt employees, who earn the same salary every week, nonexempt employees are paid by the hour and earn overtime pay after they reach the 40-hour threshold.

"You need to think long and hard about how you classify employees," said **Jonathan Trafimow**, a partner who heads the employment law practice group at **Moritt Hock Hamroff & Horowitz** in Garden City. "For borderline cases, consult with an attorney."

To be classified as exempt, employees must meet minimum salary requirements as well as have certain responsibilities, which constitutes a gray area. Employers must ask themselves questions such as whether the employee has supervisory responsibilities, if he has input in setting policies or if he has hiring and firing capabilities.

"Employers often make the mistake of relying solely on the written job description," said Andrew J. Turro, a partner in the employment litigation group of Meyer, Suozzi, English & Klein in Garden City. "But if the employee is doing something different in actuality, the job description is not worth the piece of paper it's printed on."

Another potentially risky scenario, **Trafimow** said, is when a company

issues a Blackberry to a nonexempt employee. "If he uses that Blackberry over the weekend, well, guess what, he's working," **Trafimow** said. "To avoid problems, either don't issue the Blackberry or give the employee express guidelines for its use."

It's relatively common for nonexempt employees to work more than 40 hours without being told to do so. "You may have someone whose hours are 9 a.m. to 5 p.m. The worker might say, 'The traffic is bad, so I'll show up at 8 a.m., and since I'm here, I might as well work,'" **Trafimow** said. "The boss usually knows the worker is doing this. But then the employee puts in for overtime, and the employer may be tempted to say, 'I didn't authorize this; I'm not going to pay it.'"

That's not the best way to handle it, **Trafimow** cautioned. "It's best to pay past overtime in these cases and put in a procedure and enforce it going forward," he said.

To protect themselves against potential lawsuits, Camacho Moran suggests that companies have an audit of their wage and hour practices performed. "You must understand the law and learn where your risks and vulnerabilities lie," she said. "Even in the most careful of organizations, there are typically a handful of people who are not properly classified."