

30-SECOND SUMMARY

In-house counsel must stay vigilant with respect to US wage and hour matters. Before embarking on a journey to address wage and hour issues, learn the nuances of your business and organizational structure and communicate with senior leadership. Identify potential risks and costs concerning these issues in order to get informed commitment from senior executives. Because correcting wage and hour issues can lead to exposure, engaging outside counsel during the review process can help minimize liability. Once your team has been assembled and you have gathered the relevant information related to your organization's wage and hour practices, evaluate the data to identify the areas and scope of potential risk and develop a plan. Be sure to follow up: Check in with human resources or other appropriate personnel to see how the changes are working.

Time for Change?—

CONDUCTING A WAGE AND HOUR AUDIT

By Jennifer Deitloff and Josef Glynias

As in-house counsel, some of the most complex issues to manage relate to wage and hour. Exemption misclassification, contractor misclassification, donning and doffing (i.e., putting on and taking off protective gear, clothing and uniforms), rounding errors, auto wage deduction practices and miscellaneous payroll practices are not for the weary. Not surprisingly, these complex issues may pose significant exposure to the organization. Ignoring these issues or fixing them incorrectly can spell disaster.

Last fall, the Eighth Circuit Court of Appeals provided some refuge to American employers in the donning and doffing area. In *Adair, et al. v. ConAgra Foods, Inc.*, 728 F.3d 849 (8th Cir. 2013), a class of current and former employees from the ConAgra Foods facility in Marshall, Mo., filed a collective action under the Fair Labor Standards Act (FLSA), alleging that ConAgra Foods improperly failed to pay them for time spent donning required clothes before work, and doffing those clothes after work. The employees also claimed they were entitled to be paid for the time it took to walk between changing stations and the timeclocks.

Normally, donning and doffing activities are compensable if they are “integral or indispensable” to an employee’s principal activities, and there are several factors to consider. If found to be “integral or indispensable,” the donning and doffing activities actually become principal activities in and of themselves. Because of the Portal-to-Portal Act, walking activities are normally only compensable if they are part of the continuous workday, which starts with the first principal activity and ends with the last. Taken together, the success or failure of all of the plaintiffs’ claims in *Adair* depended on showing that their donning and doffing activities were “integral or indispensable” to their principal activities.

However, in Marshall, hourly workers had been represented by labor unions for decades — and negotiated numerous collective bargaining agreements over that time — and were never paid for donning, doffing or related walking time. Under the FLSA, 29 U.S.C. §203(o), management and employees covered by a collective bargaining agreement get to decide whether time spent “changing clothes or washing” should be part of the workday. Put differently, they get to decide whether “changing clothes or washing” activities are “integral or

indispensable” to the employees’ principal activities. If the parties decide to include such activities, they become part of the workday and are compensable. If the parties exclude the activities, they are not part of the workday and are not compensable.

As a result, ConAgra Foods argued to the district court that §203(o) specifically excluded time spent donning and doffing from the employees’ workday, and the district court agreed, finding that the employees did not need to be paid for donning and doffing time. ConAgra Foods also argued that the walking time could then not be compensable. On this point, the district court disagreed and found that §203(o) activities — though not compensable — could still be principal activities that begin and end the workday. As a result, while the donning and doffing time was not compensable, the related walking time could be. ConAgra Foods appealed that finding to the Eighth Circuit Court of Appeals.

On appeal, ConAgra Foods argued that §203(o) activities are more than just noncompensable principal activities. Instead, when it applies, §203(o) actually works to exclude donning and doffing activities from FLSA coverage altogether, meaning they cannot be principal activities, and the related walking time must also be excluded from the FLSA as a result of the Portal-to-Portal Act. The court of appeals agreed. Relying on the plain language of the Portal-to-Portal Act and §203(o), the court held that

the workday does not begin until an employee performs the first principal activity that he or she is “employed to perform,” and employees are not “employed” to perform §203(o) activities at all. As a result, the §203(o) activities in Marshall could not be principal activities that began or ended the workday, and time spent walking to timeclocks from changing stations is no different than time spent walking into the facility — both are noncompensable.

Of course, the analysis of this issue is far more complicated than will be summarized in this article, but the Eighth Circuit’s decision added clarity to what has been an extremely unsettled area of wage and hour litigation, while increasing the growing split of circuit court opinions. The decision in *Adair* aligns with authority from the Seventh Circuit and is contrary to a previous decision from the Sixth Circuit. While Supreme Court review of this issue has been sought once already, the Court denied review to focus on the more fundamental question of what items constitute “clothes” under §203(o). (See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 1240 (2013).) We expect to see more courts of appeals address this issue over the coming year. Until then, *Adair* continues to provide encouraging guidance to employers in the Eighth Circuit looking for some certainty as to when the workday starts and stops.

Despite the glimmer of hope provided in the *Adair* decision, in-house



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counsel must stay ever vigilant with respect to wage and hour matters. The following “how to” provides some guidance for in-house counsel seeking to evaluate wage and hour practices.

1. **Understand your business.**

Understanding the nuances of your business and organizational structure will help narrow the scope of potential wage and hour issues that you must evaluate. For example, if the business does not require employees to wear personal protective equipment and/or uniforms, or require specific washing standards before and after a shift, then donning and doffing issues may not be at the top of your list.

2. **Get buy-in from senior leaders.**

Before embarking on a journey to address wage and hour issues, communicate with senior leadership. This communication should include an executive summary about the landscape of potential liability and your recommendation for a plan to review and minimize the same. Identify potential risks

and costs with addressing these issues in order to get informed commitment. The FLSA imposes an additional year of liability for willful violations, so failing to address issues that you find may create additional exposure.

3. **Identify outside counsel expertise early.**

Engaging subject-matter experts early on in your review process is crucial to the success of any wage and hour evaluation. Such expertise will be able to assist in developing the scope of review, the process for conducting the review and provide guidance on the subject matter in general. Note that wage and hour obligations can vary with state law, so finding an expert in the wage and hour area not only saves time but also ensures you will understand all of the rules. Additionally, correcting wage and hour issues can unfortunately lead to exposure, so engaging outside counsel during the review process can help minimize liability with future litigation.

4. **Carefully evaluate current practices.**

Interview HR managers or other appropriate personnel at corporate and remote locations. Obtain records to cross reference information you learn from interviews, including timeclock reports, payroll records, and time-keeping policies and procedures. Consider whether you will conduct the review as an audit to protect the attorney-client privilege and tailor the review accordingly.

5. **Create a priority list.**

Once you gather the relevant information related to your organization’s wage and hour practices, evaluate the data to identify the areas and scope of potential risk. Priority might be given to issues with greater potential liability. However, correcting the low-hanging fruit with less exposure first may be the preferred route.

6. **Develop a plan.**

Think about the big picture with regard to what you will need in order to effectuate the necessary changes. Communicate with appropriate business leaders throughout the process to identify potential hurdles that must be addressed. Determine what you need and what it will cost, such as additional timeclocks, as well as the time to obtain and install them. Develop a communication strategy to minimize risk when explaining changes to employees. Determine if new policies/practices need to be developed. Determine what training may be necessary to ensure compliance.

7. **Execute.**

Take action against your plan. Be prepared to address issues that arise that require a deviation from your plan.

8. **Follow up.**

Check in with human resources or other appropriate personnel to see how the implemented changes are working. Review internal records to confirm that appropriate changes have been effectuated as designed. Ensure appropriate policies/practices supporting such changes are consistently followed. Identify whether the changes have brought forth any additional issues or questions. Make adjustments, as necessary.

9. **Rest.**

Repeat the first eight steps for the second issue on your list. **ACC**

ACC EXTRAS ON... Wage and hour issues

ACC Docket

Reducing Exposure to Wage and Hour Liability: Twelve Tips for 2012 (Apr. 2012). www.acc.com/docket/wage-hour_apr12

Watching the Clock: Wage and Hour Class Actions (Apr. 2011). www.acc.com/docket/watching-clock_apr11

Top Ten

Top Ten Wage and Hour Traps (Mar. 2013). www.acc.com/topten/wage-hour_mar13

Presentation

Litigation Armoring – Building Advance Defenses to Common Wage and Hour Class Claims (Oct. 2013). www.acc.com/wage-hour_oct13

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