

Morgan Lewis

together

2010 Prediction: Florida to Remain a Hotbed for FLSA Litigation

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February 3, 2010

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The Rise in FLSA Cases in Florida

- Since 2003, federal court filings of wage and hour collective actions have surpassed employment discrimination class actions.
- Wage and hour lawsuits have **more than doubled** from 2001-2009, and Florida federal courts remain a preferred forum for wage and hour litigation, with the S.D. Fla. and M.D. Fla. leading the way.
- In 2008 alone, **1609** new FLSA cases were filed in the Southern District, followed closely by **1419** in the Middle District.
- In 2009, **nearly 2/3** of all Florida FLSA cases were in the Southern District (including Miami, Fort Lauderdale, Palm Beach, and the Florida Keys), with **approximately 1/3** being filed in the Middle District (with divisions in Orlando, Tampa, Jacksonville, Ft. Myers and Ocala).
- Employment Law360 reports that the Southern District accounts for **more than 28%** of all FLSA suits throughout the U.S.

Distribution of FLSA Cases in Florida Federal Courts Among Firms

- Shavitz Law Group, P.A.: 17.2%
- Morgan & Morgan, P.A.: 13.9%
- Pantas Law Firm: 8.9%
- Remer & Georges-Pierre: 4.0%
- Ross Law Group: 3.8%
- Bober & Bober: 3.3%
- Rosenthal, Levy & Simon: 3.1%
- The Morgan Law Group: 3.1%
- Robert S. Norell, P.A.: 2.8%
- Other law firms: 39.8%

Solicitations

Investigation of **ABC COMPANY** for **Unpaid Overtime Violations**

This is to inform you of our investigation of **ABC Company** nationwide. Please contact us if you have information about **Position XXX** who, on a regular basis had to work through lunch, and as a result, worked overtime hours (more than 40 hours in a work week), had to work other overtime hours "off-the-clock," or had to work overtime hours, simply because of being paid a salary or of having the job title, **Position XXX**.

Under the law, the job title chosen by the employer does not control whether an employee is entitled to overtime wages, and the fact the employer paid a salary does not control either. Rather, the right to overtime pay is determined by type(s) of duties an employee primarily performs on the job.

Overtime must be paid properly for all overtime hours worked.

The law generally allows only two years after a week with unpaid overtime to bring a claim or sue for it, which makes it important not to let time pass. Even if you do not have copies of your time records, it is often still possible to pursue a claim according to your memory of the hours you worked. It is the employer's legal responsibility to maintain time records, not the employee's duty.

If you, or anyone you know, has information that you would be willing to share with us to help us in our investigation of unpaid wages at **ABC Company** please call us toll-free at **(888) 588-9288** or contact us via email at Info@HelpingWorkers.com. More information about this investigation, our law firm and our experience in representing employees is available at www.HelpingWorkers.com. We look forward to hearing from you.

Founded in 1999, the **Shavitz Law Group, P.A.**, helps employees and workers by handling a wide variety of lawsuits against employers that do not properly pay their employees for all their hours worked.

Call us today for a **FREE** Consultation:

(888) 588-9288

www.HelpingWorkers.com

Frequently Asked Questions

Q: Do salaried employees have rights to overtime?

A: Yes. Many employers and employees share the misconception that salaried employees do not deserve overtime wages. Salaried employees DO deserve overtime unless they are executives, administrators or professionals, as those terms are legally defined. Job titles do not control, but actual duties do. Such exceptions are legally complicated, and therefore, we suggest that if someone is salaried and shares an interest in recovering their overtime, call the **Shavitz Law Group** for a free evaluation.

Q: Have I waited too long to bring a claim for unpaid overtime wages or unpaid minimum wages?

A: The Fair Labor Standards Act permits an employee to recover up to two years of unpaid back-wages (sometimes three years if the employer's violation is found to have been reckless). Thus, if it is less than 3 years since your employment ended, we may be able to help you.

Q: Will I be able to recover overtime wages if I did not maintain time records throughout my employment?

A: The Fair Labor Standards Act makes it the employer's legal responsibility to maintain time records. It is not the employee's duty to preserve such time records. If the employer fails to maintain such ~~records~~, will not prevent your ability to prove your claim pursuant to your memory of hours worked. If an employer does not maintain complete time records, the law does permit you to reasonably estimate the number of hours you worked in your typical work weeks even if you don't have a diary or other record of every such hour.

Industry Distribution and Trends

- Consumer Products 27.4%
- Health Care 16.3%
- Construction 10.5%
- Retail & Services 10.0%
- Natural Resources 4.7%
- Industrial Mfg. 4.2%
- Energy 3.2%
- Food & Agriculture 3.2%
- **Other Industries** 20.5%

Wage and Hour Trends to Watch in FL

- Misclassification problems
- Mistakes in payroll processing from major third-party vendors
- “Off the Clock”/call center cases
- Expanding definition of “work time”
- Independent contractors

Learning from Wage and Hour Litigation: Certification Problems

- Federal courts may exhibit more willingness than many state courts to certify based on little more than common classification of an entire group as exempt and common job titles
- Certification currently depends on individual preferences of individual judges in both state and federal courts
- A 'rubber stamp' standard to conditional certification?
- So, how do you avoid these problems?

Top 10 Ways to Avoid Wage and Hour Trouble in Florida ... and Beyond.

- How to prevent litigation and mitigate risks

Exempt Employee Classifications

1. **Classify nonexempt employees as nonexempt.**

- Do not use the “white-collar exemptions” unless the employee’s actual duties (especially his or her primary duty) permit the exception.
- Conduct individualized position review and risk assessment.
- Periodic evaluations of “exempt” status.
- Privilege issues associated with audits and position review.
- Do not treat “trainees” as exempt before they qualify.
- Do not take improper deductions.

Nonexempt Employees – Paying for All Compensable Preliminary and Postliminary Work

- 2. Record and pay for all minutes and hours of work between the first and last work activity of the day (except bona fide meal periods).**
 - Determine whether preliminary/postliminary activities are compensable “work.”
 - Commuting to work or walking from the subway or parking lot to the work station – compensable?
 - Waiting to check in and out of work – compensable?
 - Turning on machinery/computers – compensable?
 - Waiting to don/doff protective clothing – compensable?
 - Make sure you meet the applicable FL minimum wage rate

Nonexempt Employees – Calculating the Regular Rate of Pay

- 3. Include all remuneration (except that which the law allows you to exclude) in the regular rate of pay before calculating regular and overtime rates.**
- Over-reliance on computerized payroll system may be a problem
 - Properly calculating overtime?
 - Including travel time as compensable time?
 - Including nondiscretionary bonuses and commissions in the regular rate of pay?
- Don't assume that your payroll processor is asking the right questions!

Nonexempt Employees – Meal Periods

- 4. Except in very limited circumstances, count as hours worked any meal periods that are less than 30 minutes or that are interrupted by work, and record that the meal breaks were provided.**
 - Do not use improper rounding policies and systems at the beginning or end of work shifts and meal periods.

Nonexempt Employees – Fluctuating Workweek

- 5. Only use the fluctuating workweek method of paying for overtime if (a) weekly work hours truly fluctuate, (b) the employee clearly understands before the work is performed how overtime will be calculated, (c) the salary is not reduced in any workweek, except in very limited circumstances, and (d) state law permits use of the method.**

Nonexempt Employees – The Danger of Remote Work Devices

6. **Record and pay for all work you knew or had reason to know was performed, e.g., before or after the scheduled workday, at home, or at other remote locations.**
 - Make sure you have travel, BlackBerry, and mobile phone policies.
 - Consider limiting remote work devices (BlackBerry, cell phone, laptop) only to exempt personnel, and only as needed.
 - If nonexempt personnel need short-term remote access, consider a signed acknowledgment that, among other things, provides that:
 - *Tools may not be used for business outside scheduled work hours, except at the express direction of a supervisor;*
 - *They must record and report all time (except perhaps de minimis time) spent performing business activities;*
 - *At any time, management may require that the remote work tool be returned.*
 - Do not distribute electronic devices to nonexempt employees.

General – Compliance Audits

7. **Conduct periodic preventative compliance audits to ensure correct classification and no “off the clock” work.**
 - Identify lowest-level exempt positions at your organization and audit, audit, audit!
 - Do not distribute electronic devices to nonexempt employees without understanding and managing the risk of additional wage and overtime claims.
 - Conduct periodic audits of remote tool records compared against time reports; advise employees/managers of audits to encourage accurate time reporting/recording.
 - Consider written agreements with employees regarding any **on-call** work.
 - Are your independent contractors really employees?

General – Training and Discipline

8. **Regularly train managerial, payroll and HR employees (including those in local offices/facilities) to know and comply with wage and hour laws, and keep a record of all such activities.**
 - **Require managers** to confirm in writing that they have no knowledge of off-the-clock work.
 - **Train managers** on company policy so that they do not encourage or ignore off-the-clock work.
 - **Discipline managers** that permit off-the-clock work.

General – Clear Compensation Policy

- 9. Develop and clearly communicate a compensation policy that prohibits improper deductions and contains an effective complaint mechanism that employees may use to report improper wage and hour practices. Promptly investigate any complaint and correct any improper practice.**

General – Stay Informed!

10. Stay informed of FLSA and state requirements by:

- subscribing to publications;
- attending training courses;
- seeking periodic advice from outside attorneys regarding changes in the law or the interpretation of the law; and
- Making sure all required bulletins, posters and materials (including tip credit information) is posted and up to date.

Questions?



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