EEOC FOUND TO BE WILLFUL VIOLATOR OF WAGE AND HOUR LAWS

By

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The Equal Employment Opportunity Commission (EEOC) has sat in judgment over the business decisions of many U.S. businesses. Ironically, when that spotlight was turned on the EEOC, the EEOC was found not only to have violated the law, but to have been a "willful violator" of the wage and hour laws, thereby subjecting the federal agency to liquidated damages under the Fair Labor Standards Act (FLSA). In addition to providing a bit of situational irony for U.S. employers, the EEOC's mistakes also provide a valuable lesson on the pitfalls of the U.S. wage and hour laws.

The EEOC began a policy in 2003 of requiring certain non-exempt employees to take compensatory time off rather than receive overtime pay for hours worked over 40 in a workweek. The employees affected by this requirement included EEOC investigators, mediators, and paralegals. These employees were represented by a union called the National Council of EEOC Local 216. The employees complained to the union about the practice, and the union filed for arbitration pursuant to the collective bargaining agreement with the EEOC.

The Arbitrator found in favor of the employees' union, ruling that the EEOC had been in violation of both its union contract and the FLSA since 2003 by not allowing non-exempt employees to receive overtime pay. According to the Arbitrator, "There is an *entitlement to overtime pay*, whereas compensatory time operates as *alternative* should the employees request it." In other words, the employees have a right to receive overtime, whereas compensatory time is an option. Under the law, an employee's choice of receiving compensatory time off instead of receiving overtime pay "must be an uncoerced one." The EEOC ran into trouble when it began informing employees that overtime pay was not available and that the employees could only receive compensatory time off for time worked over 40 hours in a workweek.

In an FLSA overtime suit, an employer can be subject to liquidated damages above and beyond the actual damages if the employer fails to prove it acted in "good faith" and had reasonable grounds for believing its actions did not violate the law. The burden of proof rests on the employer, and in this case, the Arbitrator found that the EEOC failed to carry its burden. By being found to be a "willful violator," the EEOC's liability to the employees reaches back three years from the union's original April 2006 grievance, rather than the normal two year statute of limitations.

The Arbitrator also rejected the EEOC's argument that overtime hours worked by covered employees were "voluntary," finding the EEOC's arguments to be "disingenuous." According to

the Arbitrator, "as I believe the evidence amply demonstrates, extra hours were frequently worked and these were, for the most part, not in any way attributable to mere employee preference and/or convenience." Thus, while EEOC headquarters may have issued written instructions that employees were not to work overtime, these memos did not operate as a "shield against the pattern, revealed in this record" that supervisors in the field followed a practice of knowing that overtime work would frequently be performed for the benefit of the agency. Regardless, the EEOC failed to give employees a choice as to whether or not to have their excess work compensated by overtime pay, but rather provided employees with a "sole alternative . . . of compensatory time."

Given the significant increase in wage and hour litigation, we have been advocating that employers review their wage and hour policies *and* practices. While there is a significant rise in wage and hour litigation, many of these claims are preventable on the front end if employers take the time to look into how they are conducting their business. The EEOC would have been well-served by following this advice. Two obvious "morals of the story" emerge from the EEOC's predicament. First, do not mandate that employees take compensatory time off in lieu of overtime. You will be caught in a trap. Second, if you have a policy against overtime, do not turn a blind eye to what the actual *practice* is. If front line supervisors are allowing the employees to continue to take overtime, you will have been found to have "suffered or permitted" the work for your benefit. So take the time now to review your policies and practices. An ounce of prevention is always worth a pound of cure.