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WAGE AND HOUR LAW

Broken bathroom break policy costs employer $1.75 million

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Employment law is full of worst-case scenarios. Attorneys are frequently asked what an employer's legal exposure will be if it takes a particular course of action. But we rarely see those predictions come true. When they do, employers should use them as a teachable moment and consider what lessons can be learned from another employer's misfortune. There is much to learn from a recent case involving American Future Systems, Inc. (AFS).

How not to manage employees

The case provides employers a valuable lesson on how not to manage employees. In 2009, AFS issued a policy allowing employees to take breaks "at any time" provided they clocked out. The practical application of the policy meant that employees were not paid for time spent taking care of their physical needs, such as using the bathroom, and that they no longer earned minimum wage when their unpaid breaks were tallied up. Of course, that presented a

big problem because the policy resulted in violations of the federal Fair Labor Standards Act (FLSA), which governs work hours, minimum wage, and overtime compensation.

In November 2012, the U.S. Department of Labor (DOL) filed a lawsuit challenging AFS's break policy. In a move it must surely regret, AFS elected to fight the DOL's suit. The result of that decision was a $1.75 million award against the company. The award consists of back pay and damages for approximately 6,000 employees who were subjected to the unlawful policy.

Fun with the FLSA

Complying with the FLSA is not as intuitive as it is with many other employment laws. There are lots of twists, turns, and technical definitions that can get employers in trouble. As a result, guidance from an attorney is especially beneficial when dealing with the FLSA.

There are several lessons employers can take away from AFS's predicament. First, while the FLSA does not require employers to provide breaks to employees, regulations say that if an employer elects to provide breaks, short breaks (under 20 minutes) should be paid. In AFS's case, the court determined that employees were taking breaks of less than 20 minutes for purposes such as using the restroom. As a result, the breaks should have been paid. It is important to note that although the regulations provide guidance suggesting that short breaks *should* be paid, the court applied a clear-cut rule in holding that breaks of less than 20 minutes *must* be paid, leaving no discretion to the employer.

Second, because the breaks were compensable time for which employees were not paid, they were not being paid minimum wage for the hours they worked. The minimum wage issue is less complicated than the question of breaks. As a general rule, employees must earn the minimum wage for each hour of work performed. If they do not, it is a violation of the FLSA, and damages will be awarded.

Speaking of damages, we can glean another lesson

regarding attorney-client interactions. AFS attempted to defend itself by noting that it sought legal advice before implementing its break policy. However, the company refused to turn over its communications with its attorney. The court noted that absent evidence to the contrary, it could be assumed that AFS was advised of the legal pitfalls of its policy and chose to implement it anyway. In this case, limited disclosure of attorney-client communications could have helped the company. Instead, AFS ended up in a weaker position by sticking to its rights. If your company finds itself in the unenviable position of having to defend a decision made with the advice of counsel, consider whether waiving the attorney-client privilege will be helpful. Also, this case is a good reminder that all communications — even confidential e-mails to your attorney — should be written with the knowledge that they may be exposed to public scrutiny in the future.

The final lesson to take from this case is that sometimes settling a lawsuit is your best option. As we have discussed in previous articles, sometimes you should walk away from a lawsuit and live to fight another day. That is true in a variety of circumstances. Sometimes your position is legally weak and you should settle the case rather than risk an adverse judgment against your company. Also, there may be times when your position is legally strong, but the facts are unfavorable. For example, you may have good cause to terminate an employee, but a jury would find the employee sympathetic (e.g., because of military service, pregnancy, or terminal illness).

AFS faced both of those problems: Its position was legally weak, and the employees were very sympathetic. A jury would have an easy time relating to employees who earn minimum wage and are forced to clock out to use the bathroom. Given the legal uncertainties and the public relations ramifications, this case was ripe for settlement.

Bottom line

When litigation goes awry, we should take a moment and discover what we can learn from other employers' misfortune. This case should remind

employers to treat employees with common courtesy (including paid bathroom breaks) and run all compensation-related policies past counsel to make sure there are no unforeseen problems.

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