

Insights, News & Events

COUNT THE COST BEFORE WAGING THE WAR

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When Sun Tzu wrote "The Art of War" in the sixth century B.C., he probably wasn't thinking about how his advice would apply to employment law litigation in the 21st century, but he might as well have. One of his most famous quotes from that epic military treatise is "Those who wish to fight must first count the cost." A recent example from Washington state shows the value of following this sage advice.

THE FIELD OF BATTLE

Andrew Fiore worked for PPG Industries for a relatively brief period of time, roughly nine months, in 2009. He was employed as a Territory Manager, which called for him to service retail stores throughout Washington and Oregon, assisting in the selling of paint and paint products for PPG. His actual job involved him managing color samples at the paint counter of these retail stores, including rotating stock, building displays, and performing manual labor. His job also called for him to directly interact with the customers and contractors who were looking to buy products.

PPG considered him an "exempt" employee, which means they paid him a fixed salary and did not pay him any overtime. In their view, his primary job responsibility was "promoting sales," which meant that he fit into one of the white-collar exemptions that allowed them to pay him a fixed salary no matter how many hours he worked per week. According to Mr. Fiore, he worked a considerable amount of

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time beyond 40 hours per week during his brief stint at PPG, travelling to and from the 11 stores in his territory, handling after hours email and phone calls, and other functions besides his in-store job responsibilities.

After his employment at PPG ended, Mr. Fiore brought a wage and hour lawsuit against PPG, contending that his duties principally consisted of manual labor and conducting individual sales, and thus he should have been entitled to overtime pay. After sitting down and calculating how much he thought he should have been paid, Mr. Fiore concluded that he had been shorted about \$12,000.

Now \$12,000 is nothing to sneeze at. It's a considerable sum of money to the vast majority of people in this country, and someone who believed he earned that money fairly would certainly not want to give it up. From an employer's perspective – even an international conglomerate – \$12,000 is no small chunk of change either. PPG decided after it received the lawsuit that it was willing to fight Mr. Fiore's efforts to recoup that money and instructed its lawyers to defend the case vigorously. And fight it vigorously they did. For the next three years, the lawyers for PPG and Mr. Fiore waged a battle over this issue at arbitration, then at trial court, then at the Court of Appeals, and finally at the Washington Supreme Court.

When the dust settled a few weeks ago after years of fighting, the courts concluded that Mr. Fiore was entitled to recover his \$12,000 (now doubled to \$24,000 as a punishment for "willfully" withholding the overtime pay). And to cap it all off, the Court also told PPG that it had to reimburse Mr. Fiore's attorneys their fees for fighting the case on his behalf, which total over \$700,000. Yes, you read that correctly – nearly three quarters of a million dollars spent fighting over \$12,000.

COULD IT STILL BE WORTH IT?

This is not necessarily an uncommon scenario. For a variety of reasons, employers often far outspend in defense costs what it would have taken to simply settle a case early on. In PPG's view, this matter was a "test case" that would have national implications for many of its workers, which is one reason to go toe to toe all the way to the state Supreme Court.

In many other cases, employers decide to draw a line in the sand and fight a particular case to set an example for other disgruntled workers (or former workers) who may be thinking about filing a lawsuit but will think twice if they know the company will forcefully fight their case. In still other cases, employers just decide to fight a case on principle grounds – they know they are in the right, and they would rather spend money defending their position than “paying off” someone undeserving of any reward.

Of course, all of these reasons are quite justified, and at the end of the day PPG might say that they would do it all over again if they had to. But for some employers, another quote from Sun Tzu’s Art of War might be applicable when thinking about fighting employment litigation: “He will win who knows when to fight and when not to fight.” For some companies, spending \$700,000 to fight a \$12,000 claim is worth the money. For many others, this story is a cautionary tale about when to fight and when to think about resolving a case in a different manner.

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