Employers Can Learn 3 Key FLSA Lessons From 'Paid in Pennies' Lawsuit

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Employers should take heed of the lessons from a recent lawsuit filed by the U.S. Department of Labor before posting negative information about current or former employees or playing pranks on them. Thanks to social media in our digital age, private matters often become the world's business. This is especially true when people feel that they have been wronged, as in the Georgia case of *Walsh v. 811 Autoworks LLC*. What started as a private dispute between a former employee and his employer resulted in nationwide coverage of the incident in The New York Times, NBC News and other national media outlets – and a potentially costly lawsuit.

Penny-Wise and Pound-Foolish?

According to the complaint filed by the DOL in the U.S. District Court for the Northern District of Georgia on December 30, 2021, the dispute began when former employee Andreas Flaten resigned his employment with a Georgia auto repair shop. After claiming that he never received his final paycheck, Flaten allegedly contacted the owner of the shop to have it mailed to him.

Asserting that he was being given the runaround, Flaten then contacted the DOL to report that he had not received his final paycheck. When the DOL contacted the shop owner, he purportedly claimed that the shop had prepared the paycheck but that "it never made it to the mail." The shop owner then allegedly informed the DOL that he would not pay the $915 owed to the ex-employee.

According to the complaint, within hours of learning that Flaten had complained to the DOL, the shop owner purportedly took matters into his own hands. He arranged for roughly 90,000 oily pennies to be dumped onto Flaten's driveway, along with a copy of his final paycheck with an expletive written on it. Flaten allegedly spent seven hours shoveling his final paycheck from his employer — a 500-pound mound of more than 90,000 oil-soaked pennies — off of his driveway and into a wheelbarrow.

How This Employer's Stunt Drew Attention From the DOL

It was reported that shortly after receiving his final paycheck in pennies, Flaten's girlfriend took to Instagram to post a video that went viral within the first week of it being posted. What the shop owner did next only exacerbated the widespread coverage on the matter. On the shop's website, the owner noted, “What started out as a gotcha to a subpar ex-employee, sure got a lot of press.” It continued with:

> Let us just say maybe he stole? Maybe he killed a dog? Maybe he killed a cat? Maybe he was lazy? Maybe he was a butcher? … know that no one would go to the trouble we did to make a point with out [sic] being motivated.

The underlying situation struck a nerve with the public. The national recognition of the situation, and the shop owner’s response, quickly garnered attention from the DOL. On behalf of Flaten, the DOL brought a lawsuit against the repair shop and the owner in federal district court.

The agency’s primary reason for bringing the lawsuit was due to how the shop owner responded to learning that Flaten had complained to the DOL after having not received his final paycheck. The DOL alleged that this constituted retaliation under the Fair Labor Standards Act. In addition to retaliation, the DOL’s investigation into the repair shop’s affairs purportedly revealed several other potential FLSA violations.

First, it alleged that the repair shop paid employees a flat weekly rate of pay regardless of the number of hours worked per workweek, thus failing to pay legally required overtime rates. Second, it alleged that the repair shop failed to keep adequate and accurate records of employees’ pay rates and work hours, as required by the FLSA. According to the DOL, the repair shop and its owner may now be on the hook for $36,971 in back wages and damages for Flaten and at least eight other employees, in addition to potential damages relating to Flaten’s claim.

Alleged Wage and Hour Violations and 3 Key Lessons Learned

There are three key lessons for employers to learn from this stunt, even if you have no intention of dumping a mountain of coins at the house of any of your workers.

Retaliation

The DOL has taken the position that the repair shop and its owner violated the FLSA’s prohibition on retaliation by dispensing pennies on the ex-employee’s driveway and making disparaging comments about him after he reached out to the DOL for guidance on obtaining his final paycheck.

Section 15(a)(3) of the FLSA states that it is a violation for any person to:

> discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

While it is not common for the DOL to allege retaliation in a situation where an employee resigned from employment, several circuit courts of appeal have found the scope of Section 15(a)(3) includes situations where no current relationship exists between the parties, e.g., it protects an employee from retaliation from a former employer.

One important lesson here for employers is that retaliation does not have to involve a loss of pay, a suspension or a termination. Rather, as articulated by the U.S. Court of Appeals for the Fourth Circuit in its 2008 *Darveau v. Detecon Inc.* decision:

> a plaintiff asserting a retaliation claim under the FLSA need only allege that his employer retaliated against him by engaging in an action that would have been materially adverse to a reasonable employee because the employer's actions could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Ultimately, this case reinforces that employers should remain professional even when dealing with frustrating situations and employees. And they should avoid posting anything negative about current or former employees on their websites or on social media, which could also result in claims of defamation.

Recordkeeping

The DOL has also taken the position that the repair shop and its owner violated the FLSA by failing to keep adequate and accurate records of employees' pay rates and work hours. Section 11(c) of the FLSA states that it is a violation for an employer to fail to:

> make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him … for such periods of time … prescribe[d] by regulation[s] or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

The DOL often searches for recordkeeping violations during investigations, but the good news is they can be avoided. DOL regulations do not require any specific format for wage and hour records, but they do require that certain specific information be maintained by employers. For nonexempt employees, employers must maintain:

- Employee's full name and Social Security number;
- Address, including zip code;
- Birthdate, if younger than 19;
- Sex and occupation;
- Time and day of week when employee's workweek begins;
- Hours worked each day;

- Total hours worked each workweek;
- Basis on which employee's wages are paid, e.g., $9 per hour, $440 a week or piecework;
- Regular hourly pay rate;
- Total daily or weekly straight-time earnings;
- Total overtime earnings for the workweek;
- All additions to or deductions from the employee's wages;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by the payment.

Employers should maintain their payroll records for at least three years and keep them at the place of employment or at a central records office. There is also no specific timekeeping method required, so electronic or paper records will suffice. Employers just need to ensure that the records are complete and accurate.

It is always a good practice for employers to have their employees attest to the completeness and accuracy of their time each pay period. If it is necessary for a supervisor to adjust an employee's time, make sure the employee is made aware of the adjustment and request his or her acknowledgment of it.

For employers who do not have an electronic timekeeping system, there are many templates available to help with tracking time, and the DOL even offers a basic version on its website.

Overtime Pay

The DOL further alleges that the repair shop and its owner violated the FLSA by failing to pay overtime to employees that work more than 40 hours per week, instead paying all employees a flat rate regardless of the number of hours worked per week. Section 7(a)(1) of the FLSA states that

> no employer shall employ any of his employees who in any workweek … is employed in an enterprise engaged in commerce or the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The FLSA requires the payment of overtime for hours worked over 40 in a workweek. However, many states have daily overtime requirements that are more generous than the FLSA. Employers must ensure that they are complying with both state and federal law, and in some cases, local ordinances.

It is also important to remember that overtime must be paid on the employee's regular rate and not the employee's hourly rate. This can be a common misstep for employers. Under the FLSA, an employee's regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to certain excludable amounts such as health insurance, discretionary bonuses, some gifts and paid leave. So, if an employee receives a production or other nondiscretionary bonus, or some other type of compensation that does not fall into one of the statutory exclusions, it must be included in the regular rate for overtime calculations.

Proactive Prevention

While the outcome of this lawsuit remains uncertain, it demonstrates the value of taking proactive measures to prevent FLSA violations. In addition to the items mentioned above, one of the best ways employers can avoid the problems faced in this lawsuit is to conduct periodic audits of their pay practices, including overtime calculations; their record-keeping; and their timekeeping. The audits should also include reviewing handbooks and policies relating to compensation, and updating them where necessary.

Employers are well served to have a policy that establishes a process and procedure for employees to raise concerns about compensation and that prohibits retaliation. As always, it is important to train supervisors and managers on these issues so that they understand the proper method for handling them.

As this case demonstrates, the consequences of not being proactive can be potentially costly from both a financial and a reputational perspective.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Wage and Hour Practice Group.

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