Cannabis Employers Can't Escape Wage Claims, Says Court

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- **Cannabis businesses must comply with federal wage and hour law, a federal appeals court ruled, despite the fact they operate in a field still illegal under another federal law. The court said two wrongs don't make a right. Just because you are violating one federal law doesn't give you the freedom to violate another.**
- **Technically, the decision only covers cannabis employers in Colorado, Kanas, and other nearby states. But beware: a court in Oregon has also ruled the same way. You should assume that any court across the country would reach the same outcome.**
- **You should use this case as a cautionary tale and make sure you are in compliance with federal and state wage laws. We provide a few simple tips you can apply right away at the end of this alert.**

A federal appeals court just ruled an employee for a cannabis business could bring a claim for federal wage and hour violations against his employer despite the fact that another federal law continues to criminalize the drug. The September 20, 2019 ruling from the 10th Circuit Court of Appeals washes away a defense that other businesses have tried to use to their benefit. The ruling only directly applies to cannabis-related employers in Colorado, Kansas, and other nearby states. However, all employers in this field should pay attention to this decision as it may soon apply to you.

What Happened?
Michael Kenney worked as an armed security guard for Helix TCS, a security outfit in Colorado that provides services to cannabis businesses. Helix classified Kenney and his fellow security guards as exempt from overtime laws. Even though he sometimes worked over 40 hours per week, he only received a salary and did not receive overtime pay.

Kennedy filed a collective action under the Fair Labor Standards Act (FLSA), the federal wage and hour statute, alleging that Helix misclassified him and his coworkers as exempt. Helix asked the court to dismiss the case, claiming that their workers should not be protected by the FLSA. Its argument? That their work – and Colorado's entire recreational cannabis industry – violated the federal Controlled Substances Act. After all, it argued, any product containing THC is still categorized as an illegal Schedule 1 drug. Therefore, its workers shouldn't get the benefit of another federal law.

Court: Can't Have Your Cake And Eat It. Too

The 10th Circuit Court of Appeals rejected this argument and ruled that Kenney could proceed with his lawsuit. "Employers are not excused from complying with federal laws just because their business practices are federally prohibited," it said. The court ruled that cannabis employers could not both thrive in the industry and then claim that the illegal nature of their business under federal law shields them from wage and hour duties.

It noted that the FLSA was intended to be broad and remedial in nature, covering as many workers as possible. In the court's eyes, this included workers in the cannabis industry like Kenney. After all, Congress had the power to exclude cannabis workers from the law if it wanted, and the fact that it hadn't done so was telling.

What This Ruling Means For Your Business

The decision only directly impacts cannabis employers in the 10th Circuit: those in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. But the decision cited a 2017 case from Oregon, *Greenwood v. Green Leaf Lab LLC*, where the court said that "just because an employer is violating one federal law does not give it license to violate another." You can assume the *Helix* decision will only bolster the law in Oregon. And it would not be surprising if courts across the country didn't look to these cases from Oregon and Colorado and apply them the next time a similar dispute arises elsewhere.

If you are in California, Washington, or any of the 11 states (plus D.C.) that permit recreational sales, or in any of the 33 states allowing medicinal use, take notice. Helix's novel defense didn't work, so don't count on it helping you if you find yourself facing a FLSA lawsuit. The FLSA is considered a broad remedial statute and the employer bears the burden of proving the exemption.

Instead, focus your energies on avoiding a claim in the first place. Assume that your business is subject to federal wage law just like every other employer and act accordingly. Moreover, your state may have a robust local wage and hour law that wouldn't even be subject to this defense anyway.

What You Should Do

It is more important than ever for your cannabis business to comply with wage and hour laws. Once plaintiffs' attorneys across the country learn about the *Helix* decision, they will be more willing to bring claims against your company. They know you now have one fewer weapon in your arsenal. Work with your employment lawyer to make sure you're doing all you can ahead of time to stay on the right side of the law. Some things you can do on your own:

1. Ensure your overtime-exempt workers meet one of the FLSA duties tests and the new salary test.
2. Confirm your independent contractors aren't misclassified.
3. Get up to speed on overtime laws regarding piece-rate work and agricultural exemptions.
4. Make sure you are paying correctly for training hours, on-call time, waiting time, etc.
5. Enforce meal and break time rules.

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