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Wage & Hour Law Settlements Highlight Rising Wage & Hour Risks of U.S. Employers

Less than 1 week after announcing a \$1,060,554 settlement with CALNET, Inc. and two subcontractors, the U.S. Department of Labor (DOL) announced on January 24, 2011 that Washington restaurants Super China Buffet and Great Dragon Inc., doing business as King Buffet restaurants (King Buffet) will pay \$420,000 in back wages and liquidated damages to 83 employees to settle a DOL lawsuit for alleged violations of the federal Fair Labor Standards Act.

The DOL's announcement of the recovery of more than \$1.5 million in back pay under these two settlements in less than a week highlights the rising risks U.S. employers run if their overtime, wage and hour, worker classification or recordkeeping practices don't comply with the Fair Labor Standards Act or other federal wage and hour laws. Given these growing risks, U.S. employers should audit and tighten overtime, worker classification and other wage and hour practices and exercise other precautions to position their organization to defend against potential challenges.

The most recent in a series of other settlements and prosecutions, the CALNet and King Buffet settlements illustrate the significant risks that employers face if found to have failed to properly pay for on-call, standby or other compensable hours of work or otherwise compensate to non-exempt employees. Employers and others providing workforce staffing should review and tighten existing worker classification, timekeeping and classification, recordkeeping and other practices and take other steps to strengthen the defensibility of their practices.

CALNET FLSA Backpay Settlement

On January 19, 2011, the DOL announced that prime contractor CALNET Inc. of Reston, Virginia., and subcontractors Acclaim Technical Services Inc. of Huntington Beach, California., and McNeil Technologies of Springfield, Virginia., violated the FLSA by not properly compensating workers for all on-call time, resulting in overtime violations. DOL also says the employers also were found to be in violation of FLSA recordkeeping requirements for failing to maintain proper records of the number of hours worked by employees and the compensation they were paid. To settle these charges, the three companies have paid their employees a total of \$1,060,554 in back wages owed for the period between October 2008 and October 2010. CALNET paid \$676,698 to 597 employees. Acclaim Technical Services paid \$234,311 to 177 employees. McNeil Technologies paid \$149,545 to 91 employees.

King Buffet FLSA Backpay Settlement

According to the DOL's January 24, 2011 announcement of the King Buffet restaurants settlement, DOL sued the restaurants after Wage and Hour Division investigators found that King Buffet violated the FLSA by paying some waitstaff only \$10 per day, resulting in hourly pay below the federal minimum wage. In addition, King Buffet restaurants paid the kitchen staff a straight monthly salary with no overtime pay, even when these workers worked more than 40 hours in a week. The DOL also claimed investigators also found many workers at the restaurants were paid in cash, and that time and pay records were nonexistent, inaccurate, incomplete or falsified.

To settle the lawsuit, King Buffet has agreed to pay \$420,000 in back wages and liquidated damages to 83 employees. As part of the consent judgment, King Buffet also agrees not to violate the FLSA in the future and to pay \$5,000 in civil money penalties to the government.

Overtime & Other Wage & Hour Enforcement Risks Rising

The CALNET and King Buffet settlements are the latest in a wave of DOL wage and hour enforcement settlements and prosecutions. Government contractors and other employers increasingly risk triggering significant liability by

failing to properly characterize, track and pay for on-call and other compensable time in violation of the FLSA or other laws.

The FLSA requires that covered employees be paid at least the federal minimum wage of \$7.25 per hour for all hours worked, plus time and one-half their regular rates of pay, including commissions, bonuses and incentive pay, for hours worked beyond 40 per week. For those employees who customarily and regularly receive more than \$30 a month in tips, employers may pay a base rate of \$2.13 an hour in direct wages if the tips cover the difference. Employees must also maintain accurate time and payroll records. Improper classification of on-call or other hours that the FLSA requires an employer to treat as compensable exposes the employer to potential minimum wage, overtime and recordkeeping violations.

Under the FLSA, on-call time becomes compensable when the on-call conditions are so restrictive or the calls to duty so frequent that the employee cannot effectively use on-call time for personal purposes under the facts and circumstances.

Unfortunately, many employers often are overly optimistic or otherwise fail to properly understand and apply FLSA rules for characterizing on-call or other time, classifying workers as exempt versus non-exempt or making other key determinations.

Employers wearing rose tinted glasses when making wage and hour worker classification or compensable time determinations tend to overlook the significance of the burden of proof they can expect to bear should their classification be challenged. Under the FLSA and applicable state wage and hour laws, employers generally bear the burden of proving that they have properly paid their employees in accordance with the FLSA. Additionally, the FLSA and most applicable state wage and hour laws typically mandate that employers maintain records of the hours worked by employees by non-exempt employees, documentation of the employer's proper payment of its non-exempt employees in accordance with the minimum wage and overtime mandates of the FLSA, and certain other records. Since the burden of proof of compliance generally rests upon the employer, employers should take steps to ensure their ability to demonstrate that they have properly paid non-exempt employees in accordance with applicable FLSA and state wage and hour mandates and that employees not paid in accordance with these mandates qualify as exempt from coverage under the FLSA.

These mistakes can be very costly. Employers that fail to properly pay employees under Federal and state wage and hour regulations face substantial risk. In addition to liability for back pay awards, violation of wage and hour mandates carries substantial civil – and in the case of willful violations, even criminal- liability exposure. Civil awards commonly include back pay, punitive damages and attorneys' fees.

The potential that noncompliant employers will incur these liabilities has risen significantly in recent years. Under the Obama Administration, Labor Department officials have made it a priority to enforce overtime, recordkeeping, worker classification and other wage and hour law requirements. While all employers face heightened prosecution risks, federal officials specifically are targeting government contractors, health care, technology and certain other industry employers for special scrutiny. Meanwhile, private enforcement of these requirements by also has soared following the highly-publicized implementation of updated FLSA regulations regarding the classification of workers during the last Bush Administration. See [Minimum Wage, Overtime Risks Highlighted By Labor Department Strike Force Targeting Residential Care & Group Homes; Review & Strengthen Defensibility of Existing Worker Classification Practices In Light of Rising Congressional & Regulatory Scrutiny; 250 New Investigators, Renewed DOL Enforcement Emphasis Signal Rising Wage & Hour Risks For Employers; Quest Diagnostics, Inc. To Pay \\$688,000 In Overtime Backpay.](#)

Employers Should Strengthen Practices For Defensibility

As a consequence, most employers should review and document the defensibility of their existing practices for classifying and compensating workers under existing Federal and state wage and hour laws and take appropriate steps to minimize their potential liability under applicable wages and hour laws.

To minimize exposure under the FLSA, employers should review and document the defensibility of their existing practices for classifying and compensating workers under existing Federal and state wage and hour laws and take appropriate steps to minimize their potential liability under applicable wages and hour laws. Steps advisable as part of this process include, but are not necessarily limited to:

- Audit of each position current classified as exempt to assess its continued sustainability and to develop documentation justifying that characterization;

- Audit characterization of workers obtained from staffing, employee leasing, independent contractor and other arrangements and implement contractual and other oversight arrangements to minimize risks that these relationships could create if workers are recharacterized as employed by the employer receiving these services;
- Review the characterization of on-call and other time demands placed on employees to confirm that all compensable time is properly identified, tracked, documented, compensated and reported;
- Review of existing practices for tracking compensable hours and paying non-exempt employees for compliance with applicable regulations and to identify opportunities to minimize costs and liabilities arising out of the regulatory mandates;
- If the audit raises questions about the appropriateness of the classification of an employee as exempt, self-initiation of appropriate corrective action after consultation with qualified legal counsel;
- Review of existing documentation and recordkeeping practices for hourly employees;
- Explore and appropriately implement options and alternatives for calculating required wage payments to non-exempt employees; and
- Reengineer of work rules and other practices to minimize costs and liabilities as appropriate in light of the regulations.

Because of the potentially significant liability exposure, employers generally will want to consult with qualified legal counsel prior to the commencement of their assessment and to conduct the assessment within the scope of attorney-client privilege to minimize risks that might arise out of communications made in the course of conducting this sensitive investigation.

For assistance with assessing or defending your current worker classification, wage and hour or other health care and human resources policies and controls, please contact Cynthia Marcotte Stamer at cstamer@solutionslawyer.net, 972-419-7188.

For Help With Investigations, Policy Updates Or Other Needs

If you need assistance in auditing or assessing, updating or defending your wage and hour or other compensation practices, or with other labor and employment, employee benefit or compensation practices, please contact the author of this update, attorney Cynthia Marcotte Stamer [here](#) or at (469)767-8872.

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Ms. Stamer is nationally and internationally recognized for more than 23 years of work helping employers; employee benefit plans and their sponsors, administrators, fiduciaries; employee leasing, recruiting, staffing and other professional employment organizations; and others design, administer and defend innovative workforce, compensation, employee benefit and management policies and practices. The Chair of the American Bar Association (ABA) RPTA Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, and past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer works, publishes and speaks extensively on wage and hour, worker classification and other human resources and workforce, employee benefits, compensation, internal controls and related matters. She also is recognized for her publications, industry leadership, workshops and presentations on these and other human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

Other Helpful Resources & Information

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available [here](#) including:

- [Attorney Cynthia Stamer Shares Best Practices for Protecting Plan Participant & Other Employee Information At SBWA/IRS Plan Administrator Skills Workshops](#)
- [Supreme Court Medical Resident Stipend Ruling Highlights Advisability of Worker Classification & Payroll Practice Review Advisable For Health Care, Other Employers](#)
- [IRS, HHS & DOL To Delay Enforcement of New Insured Group Health Plan Non-Discrimination Rules Pending Guidance; Seek Public Input on Rules](#)

- [IRS Expands When HFSA's & HRAS May Allow Over-The-Counter Drug Purchases With Drug Cards](#)
- [Holiday Season Celebration Reminder To Manage Intoxication Risks](#)
- [Avoiding Post-Holiday Season HR Liability Hangover](#)
- [2011 Standard Mileage Rates Announced](#)
- [Proposed New DOL Defined Benefit Plan Annual Funding Notice Rule](#)
- [Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify](#)
- [Managed Care Executive Quotes Stamer On Implications Of Affordable Care Act Claims & Appeals Rules](#)
- [DOL Proposes To Expand Investment Related Services Giving Rise to ERISA](#)
- [EEOC Charges Employers With Violating ADA By Denying Medical Leave](#)
- [Annual Benefit Limitation Waiver & Anticipated HHS Medical Loss Ratio Guidance Offer Quick Acting Employers, Insurers New Mini-Med, Health Plan Design Options](#)
- [New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules](#)
- [Tighten & Update of Health & Other Plan Claims & Appeals Procedures & Documentation In Response To New Regulations, Tightening Court Review](#)
- [Small Employers Sponsoring Health Coverage May Qualify For New Tax Credit, Must Act Quickly To Comply With Other New Federal Health Plan Mandates](#)
- [Rite Aid Agrees to Pay \\$1 Million to Settle HIPAA Privacy Case As Office of Civil Rights Proposes Tighter HIPAA Privacy & Security Regulations](#)
- [New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Prohibit Plan Dumping of High Risk Members, Set Other Rules](#)
- [Review Of Worker Classifications Needed As Classification Scrutiny Rises](#)
- [Businesses Employing Children Should Review & Tighten Practices in Light of Tightened Rules & Increased Penalties](#)
- [Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child](#)
- [Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates](#)
- [Office of Civil Rights Proposes Changes To HIPAA Privacy, Security & Civil Sanctions Rules](#)

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#). For important information concerning this communication click [here](#). If you do not wish to receive these updates in the future, unsubscribe by updating your profile [here](#).

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