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## **Employer Charged With Misclassifying & Underpaying Workers To Pay \$754,578 FLSA Back pay Settlement**

Beck Disaster Recovery Inc. (Beck) will pay \$754,578 in overtime back wages to 89 current and former temporary field supervisors to settle U.S. Department of Labor Wage & Hour Division (DOL) charges that the company violated the Fair Labor Standards Act (FLSA) by improperly classifying workers as exempt from the Fair Labor Standards Act and failed to pay the workers for all compensable hours worked. Another of the mounting series of DOL overtime and wage and hour enforcement actions arising from employer misclassification of workers, the Beck settlement and other recently reported DOL enforcement actions demonstrate the significant risks that employers can incur if caught mischaracterizing or underpaying non-exempt employees. See e.g. [\*\*\\$1 Million + FLSA Overtime Settlement Shows Employers Should Tighten On-Call, Other Wage & Hour Practices.\*\*](#)

### **FLSA & Beck Settlement**

The FLSA generally requires that employers pay covered employees 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. Under existing FLSA regulations, covered employees generally include all common law employees other than those employees that the employer proves qualify as exempt. Employers also generally maintain accurate time and payroll records. Improper classification of workers as exempt from FLSA coverage, inadequate recordkeeping, or mischaracterization of compensable hours of work as non-compensable exposes an employer to significant minimum wage, overtime and recordkeeping violations. Misclassification often occurs because an employer improperly treats a worker that it recognizes to be its employee as an “exempt” employee and pays the employee on a salaried or other basis inconsistent with the FLSA, because the employer treats a worker as not its employee when that worker qualifies as its employee under applicable common law tests of the existence of an employment relationship, or a combination of both of these circumstances.

The Beck settlement announced by DOL on March 10, 2011 resolves charges that its misclassification of certain regular and temporary workers as exempt employees lead Beck to violate the FLSA in several respects. Beck provides emergency preparedness and natural disaster response services to public and private sector organizations nationwide. While its corporate offices are in Florida, and the company also maintains offices in California, Indiana, Louisiana, Massachusetts, New York, Texas, and the District of Columbia. Employees travel to natural disaster sites nationwide as needed. In addition to denying several misclassified employees overtime compensation earned for hours over 40 in a week, the DOL charged that Beck also failed to provide paid leave as required to certain of these misclassified employees. Under the

FLSA, employees claimed as exempt must receive a fixed salary that may not be reduced based on the quality or quantity of the work performed.

To resolve the DOL charges, Beck has agreed under the settlement to pay the full amount of back wages, properly classify its temporary employees as nonexempt from the FLSA and maintain future compliance with the law.

### **DOL Enforcement Demonstrates Risks For Business**

The Beck settlement and other recently reported enforcement actions send a strong signal to employers of the advisability of auditing the defensibility of their classification of workers as exempt, contractors or non-employees, and taking other steps to strengthen the defensibility of their overtime, recordkeeping, and other wage and hour practices. In recent months, DOL enforcement actions against misclassification of workers as exempt employees or treatment of contract or leased employees as non-employees have resulted in several back pay awards by several employers of more than \$1 million and many others of several hundreds of thousands of dollars. [\*\*\\$1 Million + FLSA Overtime Settlement Shows Employers Should Tighten On-Call, Other Wage & Hour Practices.\*\*](#) As the same conduct often also violates state wage and hour laws, offending employers also may face back pay and other awards from actions brought by state officials and employee lawsuits. 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.

The DOL's announcement of the Beck settlement makes clear that the DOL has made finding and prosecuting employers for these FLSA violations a priority. "Misclassification of employees as exempt from the FLSA has become a common problem and one the Labor Department is determined to bring to light," said Secretary of Labor Hilda L. Solis in connection with her announcement of the Beck settlement. "When violations of the law are found, we will take appropriate action to ensure workers are paid in full." This warning echoes similar warnings of the Secretary in other recent enforcement action announcements.

Unfortunately, many employers often are overly optimistic or otherwise fail to properly understand and apply FLSA rules classifying workers as exempt versus non-exempt, characterizing and keeping time records or making other key determinations. DOL FLSA regulations generally place the burden upon an employer receiving services from a worker to demonstrate that it either has paid the worker in accordance with the FLSA, that the worker is not its employee under applicable common law and other tests applied for purposes of the FLSA, or that the employee meets all of the applicable conditions to qualify as an "exempt" employee under the DOL FLSA regulations.

To qualify as an exempt employee, DOL FLSA regulations detail a series of specific circumstances in order for an employee to qualify as exempt. In order for one of these exemptions to justify an employer's treatment and payment of a worker as exempt, the employer generally must be prepared that the facts and circumstances relating to the relationship and services performed meet each applicable requirement for the exemption claimed. Unfortunately, many employers inadequately understand these rules or are overly optimistic in their assessment of the potential applicability of these exemptions to certain workers. As Beck and other recent enforcement actions make clear, this can be an expensive mistake.

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**

In light of rising FLSA exposures, 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 Help With Investigations, Policy Updates Or Other Needs**

If you need assistance in auditing or assessing, updating or defending your wage and hour or with other labor and employment, employee benefit, compensation or internal controls 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) RPTE 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:

- **[\\$1 Million + FLSA Overtime Settlement Shows Employers Should Tighten On-Call, Other Wage & Hour Practices](#)**
- **[CMS Publishes Proposed Consumer Disclosure Notices Detailing Required Health Insurer Rate Increase Justification Disclosures](#)**
- **[Stamer Speaks 4/29 On “Welcome to the Jungle - Health Care Reform Bootcamp”](#)**
- **[Stamer Speaks 4/28 On “Lean On Me” - Group Health and Disability Claims and Appeals:](#)**
- **[States Get More Info On Affordable Care Act Medicaid Eligibility Maintenance Of Effort; Payers & Providers Must Monitor](#)**
- **[\\$4.3 Million HIPAA Penalty Signals Health Plans, Sponsors & Service Providers](#)**
- **[HHS Imposes 1st HIPAA Privacy Civil Penalty of \\$4.3 Million](#)**
- **[NLRB Settlement Shows Care Necessary When Employers Use Social Networking & Other Policies Restricting Employee Communications](#)**
- **[Medicare Proposes To Require Providers To Notify Beneficiaries Of Quality Of Care Complaint Rights](#)**
- **[Health Care Employer’s NLRB Settlement Shows Care Necessary When Using Social Networking & Other Policies Restricting Employee Communication](#)**
- **[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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