



Employers Face Increased Civil Penalties For Child Labor and Wage & Hour Violations Under Fair Labor Standards Act Under New Law

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Employers violating federal child labor and other wage and hour rules under the Fair Labor Standards Act (FLSA) now face increased civil penalty assessments by the U.S. Department of Labor (Labor Department) for under amendments to the FLSA signed into law by President Bush yesterday. The Genetic Information Nondiscrimination Act of 2008, H.R. 493 (GINA) signed by the President yesterday primarily focuses on regulating the use of genetic information by employers, unions, employer and other group health plans, and health insurers for certain employment or benefit purposes. However, GINA also includes provisions raising the maximum civil penalties that the Labor Department can impose for violations of the FLSA child labor, wage and hour, and overtime requirements. Perhaps due to widespread publicity about the implications of genetic information nondiscrimination provisions, however, most employers are unaware of the FLSA wage and hour liability expansion hidden at the end of the legislation.

Under the FLSA, an employer generally must pay an employee in accordance with the minimum wage and overtime requirements of the FLSA unless the employer can prove that the employee qualifies as “exempt” as a white collar employee under the Labor Department’s FLSA regulations. The FLSA mandates that the base hourly rate of pay of each “non-exempt” employee of not less than the current Federally-established minimum wage of \$5.15 an hour for each of the up to initial 40 hours of work performed by the employee in any workweek. Subject to certain limited exceptions, the FLSA’s overtime rules generally also mandate that “non-exempt” employees be paid overtime pay at a rate of not less than one and one-half times the regular rate of pay for hours in excess of 40 hours of work performed in a given work week. The regulations also provide guidance for determining when leased, contract or other non-traditionally employed workers will be treated as employees, for determining when an employer must treat “on-call” time, travel time, meal and break times, and certain other time periods as compensable hours worked by a non-exempt employee, when “comp time” in lieu of the payment of wages is permitted, various alternative methods for calculating overtime under certain special circumstances, and various other rules applicable to various special circumstances. Furthermore, the FLSA also imposes various additional requirements governing employment of children under the age of 18.

Even before GINA, FLSA violations carried substantial legal risk for employers including back pay, punitive damages and attorneys’ fee awards to employees as well as carries substantial civil – and in the case of willful violations, even criminal- liability exposure. This liability exposure is further increased under the GINA amendments. As signed into law, Section 302 of GINA amends the FLSA by significantly increasing the civil penalties that the Labor Department can assess for violations of the wage and hour requirements of the FLSA both for wage and hour rule violations generally, as well as for violations of the child labor provisions of the FLSA

specifically.

Prior to GINA, the maximum civil penalty authorized by the FLSA against an employer for repeated or willful violation of the minimum wage and overtime provisions of the FLSA was \$1,000 per violation. Under GINA, this maximum penalty is increased to \$1,100.

In addition to this relatively minor increase in the maximum civil penalty for wage and overtime rule violations generally, GINA also significantly increases the maximum civil penalty exposure for employers violating the FLSA child labor provisions. Before GINA, the maximum civil penalty for violations of the FLSA's child labor rules was \$10,000 for each employee who was the subject of the violation. Under GINA, this generally applicable penalty increases from \$10,000 to \$11,000 for violations not resulting in death or serious injury. Additionally, where violations of the child labor rules result in death or serious injury to an employee under age 18, GINA amends the FLSA to authorize the Labor Department to assess a maximum fine of \$50,000 per employee for violations that are not willful or repeated or \$100,000 for a willful or repeated violations. For this purpose, a "serious injury" is defined in GINA as:

- Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);
- Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or
- Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

These increases in civil penalties became immediately effective when President Bush signed GINA yesterday.

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 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, health industry 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.

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:

- If the employer hires any individuals under age 18, audit and implement appropriate procedures to ensure its ability to demonstrate compliance with all applicable FLSA child labor rules;
- Audit each position currently classified as exempt to assess its continued sustainability and to develop documentation justifying that characterization under the FLSA;
- Review existing practices for tracking compensable hours and paying non-exempt employees for compliance with applicable regulations (including any applicable federal state break requirements) 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 available options and alternatives for calculating required wage payments to non-exempt employees; and
- Reengineer work rules and other practices to minimize costs and liabilities as appropriate in light of the regulations.

Because of the increased civil penalty and other potentially significant liability exposure under the FLSA, 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.

About Cynthia Marcotte Stamer

Board Certified In Labor and Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Cynthia Marcotte Stamer has more than 20 years experience helping employers, boards and other business leaders, employee benefit plans and their fiduciaries and administrators, insurers and risk managers, and others design, implement, administer and defend workforce management, compliance, corporate ethics and internal controls, employee benefits, and other human resources and risk management practices, policies and strategies. Her experience includes extensive work advising and defending public and private businesses domestically and internationally process and cultural reengineering, outsourcing, workforce restructuring, reductions in force, and other human resources, employee benefits, services and operational management challenges and other labor, employment, employee benefit, corporate compliance and internal controls, and other management concerns arising in connection with day to day operations as well as business mergers, acquisitions, restructurings, bankruptcies, federal sentencing guideline enforcement, and other significant workforce events.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on a wide range of employee benefit, human resources and internal controls, and other related risk management matters. Ms Stamer is the author of 100s of publications on a host of human resources and related issues, including "Managing The People & Politics In Times of Catastrophe or Change," "Mergers, Acquisitions, & Integration Solving The People Puzzle," "When Your Employee's Private Life Becomes Your Business," "Real World Compliance Strategies for Improving Operations and Managing Risk," "Bankruptcy and Employee Benefit Issues," "The Medical Coverage Continuation Requirements of The Consolidated Omnibus Budget Reconciliation Act of 1985 As Interpreted Under The Final Treasury Regs," "Company Executives, Other Business Partners Face ERISA Liability Risks If Bankrupt or Distress Company Mismanages Employee Benefit Plan Responsibilities" and many others. Her writings have appeared in a variety of other publications, including works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, SHRM, World At Work, Government Institutes, Inc. and many others. For a listing of some of these publications and programs, see cynthiastamer.com. Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications. She also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. For instance, she presently is Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group, and Vice Chair of both the ABA Real Property, Probate & Trust Section Employee Benefits & Compensation Group and the ABA TIPS Worker's Compensation Committee, Continuing Education Liaison for the ABA Joint Committee on Employee Benefits, a member of the IRS TEGE Council, a former member of the BNA EBCD Editorial Advisory Board and frequent contributing author to various publications for BNA, Aspen, SHRM, World At Work, HR Resource and numerous other publishers, and as faculty member and planning committee member for numerous human resources related programs. She also has previously served as Region IV Chair and a National Consultants Forum Board Member for the Society of Human Resources Management, Chair of the Dallas Bar Association Employee Benefits and Executive Compensation Section, and as a State Executive Board Member and Dallas Chapter Chair of the Texas Association of Business. For more details about Ms. Stamer's experience and other credentials, contact Ms. Stamer, information about workshops and other training, selected publications and other human resources related information, see CynthiaStamer.com or contact Ms. Stamer via telephone at 972.419.7188 or via e-mail at cstamer@solutionslawyer.net.

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