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FLSA Legal Insider

Should I Call a Lawyer? The FLSA's Good-Faith Defense Can Create an Absolute Defense for Employers

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An old defense to Fair Labor Standards Act lawsuits is resurfacing in federal court decisions. As FLSA cases have grown in number over the last few years, proactive employers are finding what is known as the "good-faith defense" to be helpful in prevailing against those claims, and recently several district courts have dismissed FLSA collective action lawsuits based on this defense.

The good-faith defense, under Section 10 of the Portal-to-Portal Act (29 U.S.C. §259), was created in 1947 by Congress to counter federal court decisions that had interpreted the FLSA "in disregard of long-established customs, practices and contracts" and had thereby created "unexpected liabilities, immense in amount" (29 U.S.C. §251(a)).

The good-faith defense (known in the courts as the "Section 10 Defense" or, sometimes, the "Section 259 Defense") is an *absolute* defense to FLSA liability. That is, if the defense is proven, the FLSA claims can be dismissed in the employer's favor before there is a jury trial.

The Section 10 defense should not be confused with its sibling under Section 11 of the Portal-to Portal Act, which is a good-faith defense to liquidated damages *only* — not to full liability (see ¶953 of the *Handbook*). In the case of the Section 11 good-faith defense, the plaintiff proves an FLSA claim and the issue is only the amount of damages to be awarded.

On the other hand, the Section 10 "absolute" defense provides that "no employer shall be subject to *any* liability [under the FLSA] if he pleads and proves that the act or omission complained of was in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the [Wage and Hour Division of the U.S. Department of Labor] or any administrative practice or enforcement policy of such agency."

Establishing a Section 10 Defense

The Section 10 defense requires the employer to establish that its action: (1) relied on a written regulation, order, ruling, approval, interpretation, administrative policy or enforcement policy of the Wage and Hour Division; (2) conformed with that written WHD document; and (3) was made in good faith.

As federal courts have found, the Section 10 defense was established to protect employers from FLSA liability for taking certain actions in reliance on a DOL interpretation of the FLSA, *even if that interpretation later turns out to be wrong*.

Case Study No. 1: *Kuebel v. Black & Decker (U.S.)*

For example, last year, Black & Decker successfully avoided FLSA liability and a collective action lawsuit by proving a Section 10 defense (No. 08-CV-6020, 2009 WL 1401694 (W.D.N.Y. May 18, 2009)).

In 2004, Black & Decker's human resources department took wise action: it called its outside employment lawyers to assist in developing a compensation plan for Black & Decker's "retail specialists."

The retail specialists travel to large retail home-improvement stores to assist with inventory manage-

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ment, event and brand marketing, and product training. Because the retail specialists travel from store to store, there was concern about what travel time was compensable under the FLSA (see ¶470 of the *Handbook*).

With the assistance of their attorneys, the Black & Decker human resources staff determined that Black & Decker would compensate the retail specialists for their commute from their homes to their first store of the day if it exceeds 60 miles or 60 minutes and do the same for the commute from the last store in their day to their home. The outside counsel reviewed, and then relied upon, the FLSA and its regulations on compensable travel time and normal home-to-work commutes, as well as on a Wage and Hour Opinion Letter dated Jan. 29, 1999. The lawyers opined that the proposed 60-mile/60-minute rule was lawful under the FLSA, based on the WHD interpretations.

Four years later, 130 current and former retail specialists (the named plaintiffs, plus those who opted in to the collective action) sued Black & Decker for violating the FLSA. Their FLSA claims included allegations that Black & Decker unlawfully failed to pay them for time spent commuting from their homes to their first assigned stores and from their last assigned stores to their homes. That is, these plaintiffs were challenging the 60-mile/60-minute rule, which had been adopted by Black & Decker with the advice of its employment lawyers.

The U.S. District Court for the Western District of New York subsequently determined that:

- Black & Decker had developed and implemented timekeeping guidelines that instructed the retail specialists how to record their work time, including their commuting time.
- The company had consulted with its employment lawyers for legal advice as to the proper compensation practice for the commute time.
- The employment lawyers had reviewed and relied upon the FLSA, its regulations and WHD opinion letters in their advice to the company.
- The employment lawyers' advice concerning the 60-mile/60-minute rule for commute time was rational, given WHD's interpretations and regulations.
- Black & Decker acted in good faith by compensating the retail specialists in a manner that was based on the advice of their lawyers.

Accordingly, the district court dismissed the FLSA claims about the plaintiffs' commute time. Because Black & Decker's human resources department had been proactive in seeking legal advice on their proposed compensation plan, Black & Decker avoided liability on the commute time claims.

Case Study No. 2: *Henry v. Quicken Loans*

Quicken Loans performed a similar analysis concerning its loan consultants and mortgage bankers in 2006. Quicken Loans had been sued in a nationwide FLSA collective action for its pay practices concerning mortgage loan officers. On Sept. 8, 2006, while the case was pending, WHD issued an opinion letter opining that mortgage loan officers could meet the overtime pay exemption for administrative employees (see November 2006 newsletter, p. 14).

The company's vice president of administration — a lawyer by training — testified that he had analyzed the 2006 opinion letter and had relied on it and on the FLSA regulations, other relevant WHD opinion letters and FLSA case law. He submitted his analysis to the court as part of his testimony in support of the Section 10 defense.

The district court found that the Section 10 defense applied to the mortgage banker positions after the opinion letter was issued (No. 04-CV-40346, 2009 WL 3199788 (E.D. Mich. Sept. 30, 2009)). The district court found that all three elements of the Section 10 defense were proven: reliance, conformity and good faith. Thus, Quicken Loans successfully reduced the claims and the possible damages using the Section 10 defense.

Recently, however, WHD revoked that very Sept. 8, 2006, opinion letter and issued a new "administrative interpretation" concluding the opposite about mortgage loan officers (see May 2010 newsletter, p. 14). Because the Quicken Loan case is ongoing, it will be interesting to see what effect the revocation will have on the litigation.

With that revocation, WHD also announced that it would no longer be issuing opinion letters. This action may have an effect on the Section 10 defense by reducing WHD written materials on which an employer may rely. DOL has said its new, more broadly applicable administrator interpretations will carry the same weight in legal disputes as the older, individualized opinion letters they are replacing (see July 2010 newsletter, p. 15), but to date the rate of issuance of the new administrative interpretations is much lower than the rate of issuance of older, individualized opinion letters. Additionally, there is a major difference in the process. The opinion letter process addressed FLSA issues that the public

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wanted WHD to address. The new administrator interpretations address FLSA issues that WHD wants to address. Thus, by eliminating the opinion letter process, WHD is insulating itself from the "real world" and not addressing issues that the taxpayers would like it to address.

Nonetheless, the Section 10 defense is alive and useful for proactive employers. However, to have this shield from FLSA liability, an employer must involve a lawyer early in compensation decisions. The lawyer must then provide legal advice based on WHD writings, and the employer must conform its conduct to that advice in good faith.

So, should an employer call a lawyer about those compensation issues? Doing so may very well create a shield to FLSA liability — or at least reduce damages.

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