

\$15 Million FLSA Settlement Raises Employer's Awareness of "Commuting Time"

National retailer Sears, Roebuck & Co. recently paid \$15 million to settle a federal class action lawsuit alleging that it failed to pay overtime to 16,000 service technicians for their time commuting to work, in violation of the Fair Labor Standards Act ("FLSA"). Unfortunately, the case is not an anomaly: wage and hour suits have proliferated in recent years and are on the agendas of plaintiffs' attorneys, union attorneys, and regulatory agencies alike. Virtually every industry has been "hit" with a wage/hour class action.

The Sears' service technicians performed in-home repairs on appliances and electronics for Sears' customers. Most of the technicians worked from home. Sears used a remote dispatch system, which required the technicians to download at home information about their daily work assignments, before traveling to their first job of the day. However, Sears did not deem technicians to have started their workday (and thus did not pay them), until they arrived at their first scheduled job.

A group of technicians objected to this pay practice. They claimed that their workday began from the time they were required to download their work assignments using the home dispatch system, and that Sears failure to pay for the time they spent traveling from home to their

first scheduled job violated the FLSA. Eventually, this turned into a class action lawsuit, involving claims by thousands of employees in multiple states, seeking back pay.

Under FLSA regulations, "commuting time" is generally not compensable "working time." 29 C.F.R. § 785.35. However, once an employee has "clocked in" or reported for work, the time spent traveling to a worksite may be deemed working time. 29 C.F.R. § 785.35. This was a close case. While Sears steadfastly maintained that its employees' downloading work assignments via the home dispatch system did not constitute the equivalent of "clocking in," it agreed as part of the settlement to alter its pay policies.

This case should be of particular interest to any employer which, like Sears, has non-exempt employees who work from home or "clock in" remotely before going out to their work assignments.¹

Avoiding wage and hour lawsuits should also be of paramount importance to employers with non-union employees. Unions are desperate to organize the unorganized. Their latest tactic is to generate and bankroll class action wage and hour suits on behalf of an employer's non-union workforce. As a prominent union attorney pointed out during a recent American Bar Association panel

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¹ The only comparable group for whom this would not be an issue are outside sales employees. Generally, outside sales employees are exempt from overtime requirements. Outside service technicians are not.

discussion on employee class actions: “The goal is that the lawsuit, for the benefit of the employees, will make the employees more amenable to the union’s organizing efforts.”

In August 2004, the United States Department of Labor issued new regulations regarding the so-called white collar exemptions of the FLSA. Those regulations dramatically altered the analysis an employer must undertake to determine whether an employee is exempt or non-exempt under the overtime requirements of the FLSA. The regulations are not a model of clarity. If a group of employees you are now claiming as professional or executive or administrative employees no longer fits within that exempt status, the back pay and liquidated damages potential can be costly and damaging to your

organization’s credibility as an enlightened management. That’s when union lawyers come knocking.

The best way to avoid these types of pitfalls is corrective action before you are hit with a lawsuit. Auditing your pay practices for compliance with federal and state wage and hour laws and taking corrective action is essential in this climate. You can and should be aware of whether your non-exempt employees are being properly paid and whether employees classified as exempt employees are properly classified.

We have assisted a number of our clients with audits of their wage/hour practices and would welcome the opportunity to advise your organization regarding these issues.