WAGE AND OVERTIME QUARTERLY

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"DAY-RATE" EMPLOYEES ARE ENTITLED TO OVERTIME PREMIUM PAY.

Many workplace advocates and Trial Lawyers assume that only "hourly" employees are entitled to time-and-one-half overtime pay for hours worked over 40 in a workweek. It's time to bust this myth. In fact, the right to overtime pay extends to all kinds of employees who are not paid on a traditional hourly basis.

For example, many employees are paid a fixed amount per day. These **"day-rate" employees** are especially common in the **construction, landscaping,** and **natural gas** industries. Many of these employees assume that, because they are paid by the day, it does not matter how many hours they work during the week. In fact, in many of these industries, the Boss does not even keep track of the hours worked by the employee. This lack of recordkeeping perpetuates the employee's belief that no extra overtime pay is due.

Under the federal overtime laws and regulations, most day-rate employees are entitled to extra overtime pay. *See generally* 29 C.F.R. § 778.112. In order to figure out the amount of extra overtime pay due to a day-rate employee, we need to convert the employee's day-rate into an hourly rate by dividing all the pay received during the week by all the hours worked during the week. The employee is then entitled to an extra payment equaling one-half of the regular hourly rate for every hour worked over 40 during the week.

I know this is pretty confusing, so here's an example: Joe works in the northern tier of Pennsylvania for a natural gas company. He is paid $150 for every day worked. The seven-day workweek runs from Sunday through Saturday. Joe does not work on Sunday or Saturday. But he works the following hours on Monday-Friday: Monday = 9 hrs.; Tuesday = 11 hrs; Wednesday = 6 hrs; Thursday = 13 hrs; Friday = 9 hrs. Because Joe worked five days during the week, the Boss pays him $750 ($150 X 5 days). However, Joe is entitled to an extra overtime payment because he worked over 40 hours during the workweek. Specifically, Joe worked a total of 48 hours (9 + 11 + 6 + 13 + 9) during the week. He is entitled an extra overtime payment for eight hours.

Based on the above, here's how Joe's extra overtime payment is calculated: [$750/48] X .5 X 8 hrs. Put differently, the Boss owes Joe an extra overtime payment of $62.50.

Many of our Trial Lawyer and community activist friends who receive this Newsletter are too busy focusing on their own practice areas to delve into complicated FLSA regulations. If you fall within this category, its OK to put away your calculator. Just remember one thing: **day rate employees are entitled to extra overtime pay when they work over 40 hours in a week.**

If you encounter a **current or former** day-rate employee who might not have received extra overtime pay, be sure to give us a call. We would be delighted to evaluate the situation and, if appropriate, file suit in federal court. As so many of you know, *we <u>always</u> pay a fair referral fee.*

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FEDERAL COURTS ARE STARTING TO CATCH-ON TO THE "INDEPENDENT CONTRACTOR" SCAM.

Our law firm continues to file federal court lawsuits challenging the corporate scam of misclassifying workers as "independent contractors" rather than "employees." This practice enables corporations to: (i) cheat workers out of basic benefits (such as, for example, overtime pay, worker's compensation insurance, and unemployment insurance), (ii) cheat the government out of tax dollars, and (iii) gain an unfair advantage over competitors who comply with the law.

Make no mistake about it: the practice of misclassifying employees as "independent contractors" is a disaster for American workers and their families. Congress' failure to effectively crack down on this practice is a national embarrassment.

Since our politicians are incapable of protecting working families against the independent contractor scam, it's up to Trial Lawyers and the hard-working (but under-resourced) Department of Labor to protect working families.

Based on our review of the recent caselaw, Federal Court decisions appear to be trending in favor of workers in lawsuits alleging independent contractor misclassification. It seems that Federal Judges are becoming more skeptical of the independent contractor business model.

We see hints of the growing judicial skepticism in a Seventh Circuit Court of Appeals opinion issued in the massive, multi-district litigation involving thousands of FedEx package delivery drivers allegedly misclassified as independent contractors. (Our firm has the privilege of working on the FedEx litigation alongside many excellent law firms throughout the United States.)

The Seventh Circuit opinion, issued on July 12, 2012, made some very cogent observations about the importance of the independent contractor misclassification issue:

> The question [of whether the drivers were properly classified as independent contractors] appears to be a close one. And the issue is of great importance not just to this case but to the structure of the American workplace. The number of independent contractors in this country is growing. There are several economic incentives for employers to use independent contractors and there is a potential for abuse in misclassifying employees as independent contractors. Employees misclassified as independent contractors are denied access to certain benefits and protections. Misclassification results in significant costs to government: "[B]etween 1996 and 2004, $34.7 billion of Federal tax revenues went uncollected due to the misclassification of workers and the tax loopholes that allow it." And misclassification "puts employers who properly classify their workers at a disadvantage in the marketplace[.]" FedEx has approximately 15,000 delivery drivers in the U.S. This case will have far-reaching effects on how FedEx runs its business . . . throughout the United States. And it seems likely that employers in other industries may have similar arrangements with workers, whether delivery drivers or other types of workers. Thus, the decision in this case will have ramifications beyond this particular case and FedEx's business practices, affecting FedEx's competitors and employers in other industries as well.

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Craig v. FedEx Ground Package System, Inc., 686 F.3d 423 (7th Cir. 2012).

The Seventh Circuit hit the nail on the head. In these tough economic times, the fight against independent contractor abuse is more important than ever.

If your firm represents **current or former** independent contractors in workers compensation lawsuits or other types of litigation, we would be delighted to speak with your clients about whether, due to a misclassification, they might be able to recover overtime wages and other valuable benefits. As you know, we *always* pay a fair referral fee.

OUR RECENT THIRD CIRCUIT VICTORY

Our firm is especially proud of our role in *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012), wherein the Third Circuit held that workers participating in FLSA collective actions may simultaneously assert class action claims under state wage and hour laws. The decision rejects the reasoning of at least 15 separate district court opinions. The opinion, which received nationwide attention, is one of the year's most important employment rights opinions. Pete Winebrake argued the appeal at the Third Circuit, and our winning brief was written by both our firm and our friends at Klafter Olsen & Lesser LLP (Rye Brook, NY).

Please do not hesitate to call if you ever need assistance litigating wage and overtime claims on a class-wide basis.

THE PURPOSE BEHIND OUR OVERTIME LAW

Many of you know that our federal overtime law – the Fair Labor Standards Act ("FLSA") – was enacted during the Great Depression and that the law ensures that employees are fairly compensated for working long hours. This, however, is not the only purpose behind the FLSA.

In these times of high unemployment, it's especially important to remember that the FLSA's primary purpose was to spur employment by making it expensive for companies to pay employees for working over 40 hours per week. In a fair world (one in which employers don't skirt the overtime laws) the costs to the company of paying all that extra overtime will likely tilt the scales in favor of hiring additional employees and spreading work among more employees.

A few years ago, our firm came out on the losing end of a split-decision in *Parker v. NutriSystem, Inc.*, 620 F.3d 274 (3d Cir. 2010). While the Court of Appeals' decision was very disappointing, it did contain an excellent summary of the purpose behind the FLSA:

> The legislative history of the overtime compensation provisions of the FLSA reveal a threefold purpose underlying them: (1) to prevent workers who, perhaps out of desperation, are willing to work abnormally long hours from taking jobs away from workers who prefer shorter hours, including union members; (2) *to spread available work among a larger number of workers and thereby reduce unemployment; and* (3) to compensate overtime workers for the increased risk of workplace accidents they might face from exhaustion or overexertion.

Id. at 279 (citing *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1175-76 (7th Cir. 1987)).

In sum, the FLSA's important role in fighting unemployment is more important than ever. So next time you hear someone whining about the supposed proliferation of overtime rights lawsuits, try to remind them of the FLSA's important role in fighting unemployment.

QUARTERLY QUOTE

"Justice is not to be taken by storm. She is to be wooed by slow advances."

Hon. Benjamin Cardozo

ABOUT WINEBRAKE & SANTILLO, LLC

(formerly The Winebrake Law Firm, LLC)

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

Winebrake & Santillo, LLC believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

Winebrake & Santillo, LLC goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth millions of dollars to American workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***Winebrake & Santillo, LLC*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. You never pay a fee unless you recover.

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