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Practice Update

Eleventh Circuit Weighs in On Several Important FLSA Issues

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The Eleventh Circuit Court of Appeals has issued an opinion that has significant implications for employers and employees alleging violations of the Fair Labor Standards Act ("FLSA"). *Lamonica, et al. v. Safe Hurricane Shutters, Inc.*, Case No. 11-15743 (March 7, 2013) contains several key rulings including: that undocumented workers are entitled to relief under the FLSA; that directors of corporations as well as officers can be held individually liable; and that a district court may issue jury instructions that allow but do not require the jury to apply the fluctuating workweek method to calculate damages. The decision followed a jury trial, after which the district court entered judgment in favor of the plaintiffs and awarded them back pay and liquidated damages.

Undocumented Workers May Recover Unpaid Wages

Citing its earlier decision in *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988), the Eleventh Circuit held that undocumented workers are employees for purposes of the FLSA and are entitled to recover unpaid wages. The defendants argued that the Supreme Court's decision in *Hoffman Plastic Compounders, Inc. v. NLRB*, 535 U.S. 137, 148-52 (2002) effectively overruled *Patel*. In *Hoffman* the

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Supreme Court held that undocumented workers that are terminated for union activity in violation of the National Labor Relations Act ("NLRA") cannot recover back pay. The Eleventh Circuit found that *Hoffman* was not controlling because it involved a different statute and different issues and theories for seeking recovery of wages. Therefore, undocumented workers may recover unpaid wages under the FLSA.

The defendants also argued that the plaintiffs' claims were barred under the *in pari delicto* defense because they had engaged in wrongdoing. One of the plaintiffs had submitted a false Social Security number to get hired, and both plaintiffs had failed to report their income to the IRS. The Eleventh Circuit held that for an employee's recovery to be barred for his own wrongdoing, he must be an active, voluntary participant in the unlawful activity *that is the subject of the suit*. The plaintiffs' wrongdoing was not the subject of the suit, so the *in pari delicto* defense was inapplicable.

Directors Can Be Individually Liable Under The FLSA

In general, corporate officers with operational control of a corporation's covered enterprise are employers under the FLSA and may be held individually liable. In *Lamonica*, the Eleventh Circuit held that corporate supervisors other than officers may be individually liable under the FLSA as employers if they assume operational control. The "circumstances of the whole activity" rather than the person's title will determine one's status as an employer under the FLSA. The court noted that a supervisor's ownership interest in the corporation and control over the corporation's day-to-day functions are relevant to whether the supervisor will be individually liable for violations of the FLSA. Although the individual liability must be in relation to the employee-plaintiff, a jury may infer such control from the exercise of general supervisory powers. Furthermore, one is not required to be at the

facility every day to be involved in the "day-to-day" operations. Under these standards, individual defendants in *Lamonica* who were minority shareholders and directors were properly found liable for FLSA violations along with the corporate defendant and the corporation's president.

The District May Issue Jury Instructions That Permit But Not Require Application of the "Fluctuating Workweek" Method to Calculate Damages

The defendants also argued that the trial court erred when it did not instruct the jury to calculate damages using the fluctuating workweek method. Under the fluctuating workweek method, an employee is paid a constant weekly salary for fluctuating hours, and the employee's regular rate is calculated by dividing the weekly salary by the number of hours actually worked. The employee is paid overtime at a half-time rate because the salary is intended to cover all hours worked, and therefore the employee's salary covers any overtime hours at the straight time regular rate. Furthermore, as the employee works more hours, his regular rate decreases.

The plaintiffs in *Lamonica* had received a weekly salary but no overtime. Defendants argued that the court erred by instructing the jury to calculate the plaintiff's regular rate by dividing the weekly salary by the number of hours plaintiffs' salaries were intended to compensate, rather than by the number of hours they actually worked. The jury found that the employees' salaries were intended to cover 40 hours per week rather than the actual hours worked.

The Eleventh Circuit rejected the defendants' argument, noting that under the court's instructions the jury could have found, but was not required to find, that the plaintiffs' salaries were intended to cover all hours worked. In other words, the Eleventh Circuit held that the district court did not err by allowing but not requiring the jury to apply the

fluctuating workweek method to calculate damages. The court noted that the fluctuating workweek method is not the only or even the default method for calculating damages when an employee is paid a weekly salary.

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